Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

NOVA DESIGNS, INC. d/b/a
PERFORMANCE DIVER,

Petitioner,

v.

ELECTRONICS INSTRUMENTATION &
TECHNOLOGY, INCORPORATED and
BEUCHAT USA, INC.,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Ninth Circuit possess appellate jurisdiction to adjudicate this multi-defendant, multi-claim case when the trial court certified appeals involving fewer than all claims and fewer than all defendants under Rule 54(b) without explaining the basis of the certification?

II. Does the proper legal standard for summary judgment under Section One of the Sherman Act permit summary judgment if the record is "as consistent with permissible competition as with illegal conspiracy," when the courts below find direct evidence that supplier defendants knowingly and actively supported an on-going horizontal conspiracy to eliminate price discounting dealers at the request of the conspiring full-price dealers and their trade association?

III. To be *per se* unlawful under Section One of the Sherman Act, must a horizontal dealer conspiracy to eliminate price competition by eliminating price discounters, which is joined by suppliers reach "agreement on price or price levels?"

PARTIES TO THE PROCEEDING

Petitioner, Nova Designs, Inc. d/b/a Performance Diver, (hereinafter "Performance" or "Petitioner") is an affiliate corporation of Performance, Inc. which sells bicycle clothing and equipment through mail order catalogs. Performance Diver sells scuba diving clothing and equipment at discount prices through mail order catalogs.

Respondents, Electronic Instrumentation Technologies, Inc. (hereinafter "EIT"), and Beuchat USA, Inc., are suppliers of scuba diving equipment and items, who terminated distribution to Performance Diver at the request of the Scuba Retailers Association and its members.

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OPINIONS BELOW

On May 21, 1997 the United States Court of Appeals for the Ninth Circuit issued its opinion affirming the District Court's grant of summary judgment for defendant-respondents EIT and Beuchat. The opinion of the Ninth Circuit is attached as Appendix A. The Order of the Ninth Circuit denying petition for rehearing and suggestion for rehearing *en banc* was filed July 1, 1997 and is attached as Appendix B. The summary judgment opinions of the District Court, denying the summary judgment motions of the SRA and its individual members, but granting the summary judgment motions of respondents, appear in Appendix C, D and E. The judgments of the District Court containing the Rule 54(b) certifications appear as Appendix F and G. The opinion of the Ninth Circuit upholding interlocutory appellate jurisdiction under F.R.Civ. P. Rule 54(b) is attached as Appendix H. The opinions of the lower courts are not reported.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgments of the lower court was entered May 21, 1997. The timely petition for rehearing and suggestion for rehearing *en banc* was denied on July 1, 1997. Petitioner invokes jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections One and Two of the Sherman Act, 15 U.S.C. §§1 and 2, provide in relevant part as follows:

> "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . (15 U.S.C. §1).
>
> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed [to have violated this Act] . . . " (15 U.S.C. §2).

Rule 54(b) of the Federal Rules of Civil Procedure provides:

> "When more than one claim for relief is presented in an action, . . . or when multiple parties are involved, the [district] court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

Rule 56, F.R.Civ. P.

> (b) A party against whom a claim . . . is asserted . . . may at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> (c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . . "

STATEMENT OF THE CASE

Introduction

Plaintiff-petitioner, a discount mail-order retailer of scuba equipment, alleged that competing full-price retailers and their trade association combined to eliminate price competition by preventing discounters from obtaining necessary supplies and advertising outlets. Plaintiff further alleged that suppliers knowingly joined that on-going horizontal conspiracy by, after receiving repeated written and oral requests from conspirators to do so, terminating their relationships with Plaintiff and communicating that fact back to the conspirators and to each other, thereby effectuating and furthering the conspiracy.

The district court found a substantial dealer conspiracy to eliminate price competition and therefore denied respective summary judgment motions by the trade association and dealer defendants. However, the court held that *Monsanto*[1] and *Business Electronics*[2] governed the

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[1] *Monsanto Co. v. Spray-Rite Service Corp.* 465 U.S. 752, 104 S.Ct. 1464 (1984).

[2] *Business Electronics Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988).

summary judgment motions filed by the supplier defendants because the conspiracy as alleged is "vertical," not horizontal, contrary to the recent Seventh and Third Circuit decisions. According to the Ninth Circuit, suppliers are entitled to summary judgment if the record "is as consistent with permissible competition as with illegal conspiracy." Moreover, such a conspiracy is not unlawful unless there is "an agreement on price or price level." (Appendix H, Ninth Circuit Opinion filed May 21, 1997, p. 2). In other words, the Ninth Circuit decision, affirming summary judgment in favor of the supplier defendants, agreed that an on-going horizontal dealer price fix/boycott conspiracy which is alleged to be joined by suppliers becomes "vertical" with respect to the suppliers; therefore the *Monsanto* test for proving existence of a vertical bilateral agreement, and the *Business Electronics* standard for proving *per se* illegal vertical price-fixing, apply to the suppliers but not to the retailers or their trade association.

The summary judgment standard thus affirmed by the Ninth Circuit allows suppliers, but not dealers, alleged to be participating in the same price-fixing/boycott conspiracy, to avoid trial, despite the fact that there remain genuinely disputed issues of material fact with respect to all defendants. Contrary to the Ninth Circuit opinion, if economically plausible direct evidence in the summary judgment record is equally consistent with permissible competition as with illegal conspiracy, then the case against all defendants should go to the jury.

More specifically, the lower court decisions treating this case as involving a vertical, bilateral agreement not

only are inconsistent with recent Seventh and Third Circuit decisions with similar facts, they are inconsistent with this Court's explicit distinction between "horizontal" and "vertical" in *Business Electronics* and with decades of law recognizing that when dealers form a horizontal agreement that suppliers are persuaded to join, the agreement remains horizontal, subject to review under the traditional standards for summary judgment in Rule 56 F.R.Civ.P. See, *Interstate Circuit v. United States*, 306 U.S. 208 (1939), and *U.S. v. General Motors Corp.*, 86 S.Ct. 1321, 384 U.S. 127 (1966). Moreover, because the agreement remains horizontal, the *per se* rule established in *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811 (1940) and *General Motors*, and reaffirmed in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 111 S.Ct. 401 (1990) applies: horizontal agreements to eliminate price competition are *per se* illegal even if they do not literally fix specific prices.

Statement Of Facts

The conspiracy asserted in this action and the conspiracy the District Court saw documented in the trade association's publications was a conspiracy of scuba retailers and their trade association to threaten to refuse to deal with suppliers who deal with Performance. The retailers and their trade association jointly threatened to refuse to buy from suppliers who sold products to Performance because the retailers said they could not compete with Performance on price.

The District Court found, inter alia, the retailers and their trade association communicated to the industry:

> "Our voice was heard loud and clear . . . resulting in a proclamation by [a supplier of advertising] to drop mail order advertising . . . " (District Court Order dated January 10, 1996, p. 12).

> The District Court pointed out that the President of the trade association published to the industry:

> "We welcome [the supplier of advertising] to the dive industry and applaud their decision not to run mail order ads."

> He also acknowledged the supplier's refused to sell to Plaintiff in response to the "lobbying efforts" of the trade association and others. The District Court recognized that the President of the trade association even communicated to the industry:

> "I personally want to thank the retailers, **manufacturers**, instructional agencies, and others who contributed to this effort . . . The next step is simple. We, as retailers . . . should support [that supplier] to the fullest." (emphasis added). (District Court Order dated January 10, 1996, p. 12).

An officer of a dive instructional institution, PADI, wrote that Harry Truitt, a retailer and member of the trade associations board of directors, contacted PADI and complained, "the problem with mail order is it lowers prices and forces the retailer to compete." (January 10, 1996 Order, p. 4).

The district court found with respect to the SRA trade association and its members there was sufficient evidence to create a triable issue of fact. (January 10, 1996 Order at p. 13).

Supplier-Respondents, EIT and Beuchat, admitted they were threatened by the conspirator retailers. They also admit that in response to the demands of the retailers, they ceased selling to Plaintiff. They also communicated with one another about not selling to Plaintiff.

EIT sold the ORCA branded dive computer to Performance in early 1992. (Deposition of Joe May pp. 22-23). According to EIT's president, EIT received "a lot of complaints" from scuba retailers threatening to refuse to carry EIT's products as long as EIT sold to Performance. (Deposition Joe May pp. 47-50, 68). EIT promptly stopped selling to Performance Diver on March 18, 1992 (Ex. 2 to Deposition of Joe May). EIT then repeatedly communicated to the retailers EIT's agreement that it had stopped dealing with Performance Diver and would not sell to Performance in the future. The President of EIT admitted that the threats from the retailers *"weighed in his decision"* (Joe May Deposition p. 50), to stop selling to Plaintiff-petitioner.

On March 24, 1992 (Ex. 2 to Deposition of Joe May) Philip May, director of marketing of EIT wrote to the dealers:

> "Performance Diver – On March 18, 1992, [EIT's] relationship with Performance Diver was **terminated** and we will no longer accept orders from them. We hope that [EIT's] relationship with you has not been permanently damaged. [EIT's] commitment is to our dive shop customers . . . " (emphasis in original).

Again on July 12, 1993 Philip May wrote to all the retail dive stores and assured them that EIT was no longer selling to Performance Diver stating, "we fully

support, and will continue to support our ORCA retailers." (Curry declaration, doc. 000148). The Winter 1993 "Scuba Retailer" (the trade magazine published by the Scuba Retailers Association ["SRA"]) reprinted a letter written by Philip May to all retail shops. The letter assures the retailers:

> " . . . We have not and will not sell [Performance] additional units. We are making every effort to keep Performance from ever featuring [EIT] products."

The retailers understood that EIT had agreed to the retailers' demands to stop selling to Performance. For example, on June 15, 1993 one retailer wrote to EIT:

> "A few months ago **we** were told that Performance Diver would not be allowed to advertise the [EIT] computers again. . . . We can't compete with that mail order catalog . . . " (emphasis added).

(Ex. 17 to Joe May Deposition). In preparation for a trade show, EIT instructed its representatives at the show to explain to retailers:

> "we have moved to support our dealers by not supplying Performance Diver with any additional units. . . . "

(Ex. 14 to Joe May Deposition).

EIT even admitted it "cut off" selling to mail order in order to show its support for the demands of the retail dive shops.

> " . . . we have cut off . . . mail order . . . to show the dealers support of their retail position. Problem has been compounded by Performance

> Diver and heat we are still taking from dealers . . . "

(Ex. 30 to Joe May Deposition).

EIT also admitted to consumers that it stopped selling to Performance Diver due to its participation in the boycott of the retailers against Performance. For instance, one customer was told by an EIT representative:

> "I probably should not say this, but in the industry and here the dive stores have such a powerful organization they won't allow it [EIT computer] to be sold through Performance Diver anymore." (Goron Declaration, para. 4, tab 4 to Plaintiff's Memorandum of Points and Authorities In Opposition to Motion for Summary Judgment of EIT) (R 108-110).

In 1990 Beuchat reached an agreement with Performance Diver to sell its Beuchat branded scuba products to Performance Diver. After the Beuchat products began appearing in the Performance Diver catalog, Beuchat got complaints from retailers. (de Toledo Deposition p. 30). For example, one dealer wrote to Beuchat:

> "I am sending a copy of this letter to DEMA, Scuba Retailers Association, PADI, NAUI, and as many individual shops as possible urging that until you support us, that we stop supporting you by refusing to purchase your products. Perhaps complete elimination of a line would be in order for many of us."

(Ex. 1 de Toledo Deposition).

The President of Beuchat gave a copy of this letter to Mike Curry at Performance Diver (de Toledo Deposition p. 58), and thereafter stopped selling to Performance

Diver. Beuchat's President wrote to Performance that he had sold to Performance for two years, was now ceasing to do so, that Performance should not feature any products with the Beuchat trademark in the Performance Diver catalog, but that Beuchat would consider selling private label products to Performance that could not be traced by the retailers back to Beuchat. (Ex. 2 to de Toledo Deposition).

The following document written by Beuchat and distributed to its representatives affirms to retailers, sales representatives, and other suppliers including specifically EIT, that Beuchat intends to no longer sell to Performance Diver. This document was not produced by Beuchat but rather was produced from the files of EIT and states:

> " . . . Beuchat is no longer selling Performance any Beuchat product! . . . Although we understand the problem [Performance Diver] is creating, there is little we can do besides not selling to them."

(Ex. 15 to Deposition of Joe May). At the bottom of the document, Beuchat's sales representative wrote in part the following, corroborating the nature of Beuchat's commitment to join the conspiracy:

> "We have been fielding many questions from Beuchat dealers and prospective dealers regarding the Spring issue of the Performance Diver catalog. . . . We understand that Performance declined Beuchat's offer to buy back all remaining product. **Beuchat has realized that dealers are reluctant to do business with a company**

> **that sells mail order.** We appreciate your support." (emphasis added).

(Ex. 15 Deposition of Joe May).

The district court's separate orders denied summary judgment to the SRA and the retailers finding evidence of their horizontal conspiracy to pressure suppliers in to refusing to sell to discounters. However, the district court also found as a matter of summary judgment the suppliers did not join the conspiracy under the *Monsanto* standard. Under Rule 54(b) the District Court certified the judgments of EIT and Beuchat for piecemeal appeals over the Petitioner's objection. The district court's certifications made no findings, but simply quoted Rule 54(b) by stating "there is not just reason for delay of entry of a final judgment." The Ninth Circuit affirmed jurisdiction and affirmed summary judgment under a standard that the evidence was "at least as consistent with permissible competition as with illegal conspiracy." (Appendix H, p. 2). Both the District Court and the Ninth Circuit also concluded that even if there was a genuine issue as to whether EIT and Beuchat had joined the conspiracy, the conspiracy was not illegal as to them because there was no evidence that they agreed with others as to "price or price levels."



REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S DECISION UPHOLDING APPELLATE JURISDICTION TO HEAR PIECEMEAL APPEALS, WHEN THE DISTRICT COURT FAILED TO ANALYSE OR EXPLAIN THE BASIS OF CERTIFICATION UNDER RULE 54(b), CONFLICTS DIRECTLY WITH A RECENT ELEVENTH CIRCUIT DECISION AND IS PREJUDICIAL TO PLAINTIFF IN THIS CASE.

Performance filed in the Ninth Circuit a MOTION TO STAY THE BRIEFING SCHEDULE UNTIL FINAL RESOLUTION OF ALL CLAIMS PENDING IN THE TRIAL COURT. Performance also filed in the Ninth Circuit an APPELLANT'S MOTION TO VACATE JUDGMENT OF TRIAL COURT. The basis of each motion was that the District Court should not have entered the Rule 54(b) judgments for EIT and Beuchat which Performance also opposed in the District Court, because there were still pending at the time of the entry of the Rule 54(b) judgments, a counterclaim filed by EIT and claims by Performance against defendants who did not prevail on summary judgment. The motions were denied by the Ninth Circuit. See, Order March 11, 1996. The Rule 54(b) judgments of the District Court regarding respondents EIT and Beuchat simply state:

> " . . . the court having expressly determined there is no just reason for delay of entry of a final judgment [judgment is entered]."

The trial court simply restated the Rule and expressed no findings whatsoever. At the time there were

still pending claims against remaining defendants, and a counterclaim[3] filed by EIT.

The Ninth Circuit's affirmance of the Rule 54(b) judgment which simply recited the Rule, is in direct conflict with the Eleventh Circuit in *Ebrahimi v. City of Huntsville Board of Education*, 114 F.2d 162 (May 9, 1997). In denying appellate jurisdiction, the Eleventh Circuit in *Ebrahimi* stated in pertinent part:

> " . . . [W]hen a sound basis for the certification is not obvious and the district court merely repeats the language of the Rule or frames its certification in conclusory terms, we have little choice but do dismiss the appeal for lack of a final judgment. A district court's bare statement that there is no just reason for delay does not suffice to establish that the nature of the case warrants a departure from the general rule, which provides that a final judgment is proper only after the rights and liabilities of all the parties to the action have been adjudicated."

114 F.3d at 166-167.

Accordingly, this Court is urged to grant the Petition for Certiorari to determine that the Ninth Circuit lacked jurisdiction to affirm the appeal since the District Court incorrectly entered judgments for respondents EIT and Beuchat under Rule 54(b).

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[3] When EIT filed its counterclaim, under Rule 13(a) F.R.Civ.P. that counterclaim had to "arise out of the transaction or occurrence that is the subject matter of the opposing party's claim."

As is clear from the Ninth Circuit's opinion, because the Court considered the EIT and Beuchat appeals piecemeal it apparently was not aware the district court found a horizontal conspiracy or the details of the record showing the same. In light of this obvious prejudice to Petitioner, this case is an excellent vehicle to resolve the conflict between the Ninth and Eleventh Circuits on piecemeal appeals.

II.

THE NINTH CIRCUIT DECISION AFFIRMING SUMMARY JUDGMENT TO SUPPLIERS WHO WERE ALLEGED TO HAVE JOINED AN ONGOING HORIZONTAL PRICE FIX/BOYCOTT CONSPIRACY BECAUSE THE RECORD IS *"AS CONSISTENT WITH PERMISSIBLE COMPETITION AS WITH ILLEGAL CONSPIRACY"* CONFLICTS WITH RECENT DECISIONS OF THE SEVENTH AND THIRD CIRCUITS AND THIS COURT'S LONGSTANDING DECISION IN *INTERSTATE CIRCUIT* AND WITH RULE 56.

The District Court in its January 10, 1996 Order relying on the Third Circuit's opinion in *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3rd Cir. 1994)[4] and, consistent with the Seventh Circuit opinion in *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217 (7th Cir. 1993),[5]

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[4] The Third Circuit applied an *Interstate Circuit* standard and not a *Monsanto* standard for determining whether to present a jury question as to whether some of the manufacturers, such as FSC, joined the conspiracy where the reasons offered for refusing to deal with plaintiffs were pretextual.

[5] The Seventh Circuit found there was sufficient evidence of a group boycott/price fixing conspiracy where competing

applied a horizontal legal standard to evaluate the conspiracy evidence regarding the retailers and the trade association. Denying the retailers and the trade association summary judgment, the District Court found there was sufficient evidence that the scuba retailers and their trade association engaged in a horizontal conspiracy by coercing suppliers not to deal with Plaintiff to eliminate competition from the price discounting Plaintiff. That ruling notwithstanding, with respect to the same conspiracy, when it came to evaluating evidence to link the supplier defendants to that conspiracy, the District Court abandoned the horizontal standard and applied a vertical *Monsanto-Jeanery*[6] single-dealer, single-supplier, termination standard. The District Court expressly stated that *Jeanery* was in conflict with *Denny's* and that it would apply *Jeanery*. Specifically, the district court stated:

> " . . . Thus, and agreement between EIT or Beuchat and the scuba retailers would be a vertical agreement, and thus, a vertical restraint. *Denny's* notwithstanding, the better view is to look at this case as a vertical restraint. Thus, the court will apply *Monsanto* and *Jeanery*."

(Appendix D, Order 9/12/95, p. 4). The Ninth Circuit agreed stating:

> "this case is indistinguishable from our decision in *Jeanery* . . . which is controlling. Moreover, Nova Designs' (hereinafter "Performance")

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retailers conspired to pressure the supplier of a boat show to refuse to allow the plaintiff retailer to participate in the boat show.

[6] *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988).

> argument that this is a horizontal conspiracy, not a vertical conspiracy, is not persuasive; the Supreme Court rejected a near-identical argument in *Business Elec.*, . . . " (Ninth Circuit opinion at pp. 2-3, Appendix A).

Moreover, the Ninth Circuit specifically held the conspiracy evidence against EIT and Beuchat was "at least as consistent with permissible competition as with illegal conspiracy." (Appendix A, p. 3). Such a summary judgment standard conflicts with Rule 56 which requires summary judgment be denied where evidence weighs equally with regard to liability. This Court created an exception to the Rule 56 summary judgment standard for vertical bilateral termination cases in *Monsanto* or where there is no direct evidence of conspiracy or where Plaintiff's theory is implausible as in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986). See also, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2072 (1992), recognizing the limitations of *Matsushita* and *Monsanto*.

Contrary to the Ninth Circuit's misapplication of *Business Electronics*, no language could speak more clearly that the conspiracy (of retailers coercing the suppliers to refuse to deal) is horizontal than footnote 4 of Justice Scalia's majority opinion in *Business Electronics* Footnote 4 in pertinent part is as follows:

> FN4. " . . . [A] facially vertical restraint imposed by a manufacturer only because it has been coerced by a "horizontal carte[l]" agreement among his distributors is in reality a horizontal restraint. . . . [A] restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement."

The above quote from *Business Electronics*, supra together with the opinions in *Denny's*, supra and *Alvord-Polk*, supra show the conspiracy is horizontal. Very recently in *In re Brand Name Prescription Drugs Antitrust Litigation*, ___ F.3d ___, 1997 WL 471819 (7th Cir. 8/15/97) (Posner), the Seventh Circuit reaffirmed that a conspiracy remains horizontal even when joined by defendants of different marketing levels and the standard for proving the conspiracy is consistent with *Interstate Circuit* (recognizing as illegal an agreement among manufacturers and wholesalers to eliminate price discounting).

With respect to whether the situation at bar involves a rational economic motive to conspire[7], one only need look to this Court's opinion in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 105 S.Ct. 2613 (1985). This Court would view the situation in the case at bar to be horizontal *per se* illegal rather than vertical under *Monsanto*, and as involving a rational economic motive to conspire. In 1985 the year after it decided *Monsanto*, this Court decided *Northwest Wholesale*. This Court described the exact situation in the case at bar as an example of horizontal *per se* illegal conduct when it stated:

> "Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or

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[7] A summary judgment standard announced in *Matsushita*, supra.

> **coercing suppliers** or customers **to deny relationships the competitors need** in the competitive struggle.' " (emphasis added) 105 S.Ct. at 2619.

Accordingly, the decision of the District Court as affirmed by the Ninth Circuit (that applied a horizontal conspiracy standard to retailers, but a vertical conspiracy standard to suppliers, to deny summary judgment to the former but to grant it to the latter in the same conspiracy) is in direct conflict with the Third Circuit in *Alvord-Polk*, and with the Seventh Circuit in *Denny's*. Such an unprecedented holding is also in conflict with the history of antitrust opinions of the Supreme Court and specifically in conflict with the plain language of footnote 4 of *Business Electronics*, and with the plain language of *Northwest Wholesale*.

III.

THE NINTH CIRCUIT'S CONCLUSION THAT AN ONGOING HORIZONTAL CONSPIRACY AMONG RETAILERS TO ELIMINATE PRICE COMPETITION BECOMES *"VERTICAL"* WHEN SUPPLIERS JOIN THE CONSPIRACY SO THE *PER SE* RULE DOES NOT APPLY UNLESS THE CONSPIRACY FIXES SPECIFIC PRICES OR PRICE LEVELS CONFLICTS WITH *BUSINESS ELECTRONICS, PALMER* AND *GENERAL MOTORS* PLUS RECENT SEVENTH AND THIRD CIRCUIT DECISIONS

In the case at bar, the panel relying on *Business Electronics*, supra incorrectly held plaintiff must prove actual agreement on specific prices or price levels resulting from the conspiracy. Under *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 111 S.Ct. 401, 402 (1990). (Two parties then in a

vertical relationship agreed to eliminate price competition and increase prices without specific price or price levels was *per se* illegal), this Court stated otherwise. Citing *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940), the Supreme Court re-emphasized:

> "We explained that [u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." 111 S.Ct. 402.

See also, *Denny's*, supra. After emphasizing that the conspiracy was horizontal and was not transformed into a vertical conspiracy by the presence of suppliers, the Seventh Circuit in *Denny's* stated the following about its *per se* illegality:

> Price-fixing agreements need not include "explicit agreement on prices to be charged or that one party have the right to be consulted about the other's prices." *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 48, 111 S.Ct. 401, 402.

8 F.3d at 1221.

The *per se* illegality of the horizontal price fixing/boycott conspiracy in the case at bar is also governed by *U.S. v. General Motors Corp.*, 86 S.Ct. 1321, 384 U.S. 127 (1966). In emphasizing that horizontal activity that is joined by a manufacturer or vendor is *per se* unlawful, the Court in *General Motors* stated:

> . . . We have here a classic conspiracy in restraint of trade: joint, collaborative action by dealers, the appellee associations, and General Motors to

> eliminate a class of competitors by terminating business dealings between them and a minority of Chevrolet dealers . . .

86 S.Ct 1327-28.

Review by this Court is necessary to resolve the ambiguity regarding the standard for suppliers joining a retailer-initiated conspiracy and the standard of illegality of such a conspiracy to eliminate price competition from a price discounter.

CONCLUSION

For the reasons stated above Petitioner respectfully asks this Court to grant the Petition For Certiorari.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOVA DESIGNS, INC., d/b/a PERFORMANCE DIVER, Plaintiff-Appellant, v. SCUBA RETAILERS ASSOCIATION; INTERNATIONAL PADI, INC., and PROFESSIONAL ASSOCIATION OF DIVE INSTRUCTORS; ELECTRONICS INSTRUMENTATION & TECHNOLOGY INCORPORATED, and EIT MANUFACTURING; PRESS-ENTERPRISE, INC., and UNDERWATER USA, INC.; PRINCETON TECTONICS; SCUBA TIMES; BEUCHAT USA, INC.; HARRY TRUITT; SAL ZAMMITTI; JAMES ESTABROOK; UNDERWATER USA, INC.; UNDERWATER KINETICS; ROBERT HOLSTON, Defendants-Appellees.	No. 95-56716 No. 96-55312 No. 96-55644 D.C. No. CV-94-00875-GLT MEMORANDUM* (Filed May 21, 1997)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court for the Central District of California Gary L. Taylor, District Judge, Presiding

Argued and Submitted April 7, 1997
Pasadena, California

Before: **O'SCANNLAIN** and **TASHIMA,** Circuit Judges; **WHALEY,**** District Judge.

We must decide whether summary judgment was proper in favor of antitrust defendants when the plaintiff presents little or no evidence that the defendants joined an illegal antitrust conspiracy. Since the parties are familiar with the facts, we will not recite them here.

I

As a threshold matter, we examine *sua sponte* whether we have appellate jurisdiction over these appeals. In granting summary judgment in favor of defendants EIT, Beuchat, and Princeton Tectonics ("Princeton"), the district court issued a proper Rule 54(b) certification expressly determining that there is no just reason for delay and directing that judgment be entered. We therefore have appellate jurisdiction over the appeals from the judgments in favor of those defendants. *See Frank Briscoe Co. v. Morrison-Knudson Co.*, 776 F.2d 1414, 1416 (9th Cir. 1985). As to defendants Scuba Times and International PADI, however, the district court did not issue a Rule 54(b) certification. We have no appellate jurisdiction over

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** The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

the claims against those defendants, and hence we dismiss the appeals as to those defendants for lack of jurisdiction.

II

With regard to the claims under § 1 of the Sherman Act, this case is indistinguishable from our decision in *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988), which is controlling. Moreover, Nova Designs' (hereinafter "Performance") argument that this is a horizontal conspiracy, not a vertical conspiracy, is not persuasive; the Supreme Court rejected a near-identical argument in *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988).

Performance has failed to present evidence indicating that EIT, Beuchat, or Princeton joined a conspiracy, let alone entered an agreement on price or price levels. The evidence of the conduct of each of these defendants is at least as consistent with permissible competition as with illegal conspiracy. Receiving complaints about Performance is not enough to support an inference of conspiracy, even if the termination of business relations with Performance was in response to those complaints. *Monsanto*, 465 U.S. at 763-64; *Jeanery*, 849 F.2d at 1156.

Princeton's telephone calls to other dive light manufacturers likewise does not support an inference of conspiracy; Princeton's conduct is as consistent with a legitimate business purpose as with an illegal conspiracy. *See Ralph C. Wilson Indus. v. Chronicle Broadcasting Co.*, 749 F.2d 1359, 1366 (9th Cir. 1986).

III

Performance's remaining claims under § 2 of the Sherman Act, under California's Cartwright Act, and for tortious interference with business relations and unfair competition, have no merit. Summary judgment on these claims was proper.

The appeal in case number 96-55644 is DISMISSED for lack of jurisdiction.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOVA DESIGNS, INC., d/b/a PERFORMANCE DIVER, Plaintiff-Appellant, v. SCUBA RETAILERS ASSOCIATION; INTERNATIONAL PADI, INC., and PROFESSIONAL ASSOCIATION OF DIVE INSTRUCTORS; ELECTRONICS INSTRUMENTATION & TECHNOLOGY INCORPORATED, and EIT MANUFACTURING; PRESS-ENTERPRISE, INC., and UNDERWATER USA, INC.; PRINCETON TECTONICS; SCUBA TIMES; BEUCHAT USA, INC., HARRY TRUITT; SAL ZAMMITTI; JAMES ESTABROOK; UNDERWATER USA, INC.; UNDERWATER KINETICS; ROBERT HOLSTON, Defendants-Appellees.	No. 95-56716 No. 96-55312 No. 96-55644 D.C. No. CV-94-00875-GLT ORDER (Filed Jul - 1 1997)

Before: O'SCANNLAIN and TASHIMA, Circuit Judges; WHALEY,** District Judge.

The panel has voted to deny appellants' petition for rehearing. Judges O'Scannlain and Tashima have voted to reject the suggestion for rehearing en banc, and Judge Whaley so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

** The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NOVA DESIGNS, INC. dba PERFORMANCE DIVER, Plaintiff, vs. SCUBA RETAILERS ASSOCIATION, et al., Defendants.	Case No. SA CV 94-0875-GLT (EEx) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT; DENYING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT (Filed Jan 10 1996)

The court GRANTS the motions for summary judgment of Defendant International PADI, Inc. on Counts IV and V of Plaintiff's complaint. The court takes PADI's motion for summary judgment on Counts I, II, and III and Plaintiff's cross-motion for summary judgment on Count I, UNDER SUBMSSION [sic] pending additional briefing by the parties. The court GRANTS the motions for summary judgment of Defendants Princeton Tectonics and GBP, Inc dba *Scuba Times* on all counts of Plaintiff's complaint. The court also GRANTS summary judgment in favor of Defendants SRA and Zammitti on Counts IV and V of Plaintiff's complaint. However, the court DENIES these defendants motions for summary judgment on Counts I, II, and III. Last, the court DENIES Plaintiff's cross-motion for partial summary judgment on Count I against Defendants SRA.

This order will address each of the Defendants individually. Also, this order will refer to Plaintiff as "Performance."

I. INTERNATIONAL PADI

A. Count I: Section 1 of the Sherman Act

Section 1 of the Sherman Act provides that "[e]very contract, combination . . . or conspiracy, in restraint of trade" is illegal. 15 U.S.C. § 1. These three terms – contract, combination, conspiracy – are understood to embrace a single concept, something which is more easily called an "agreement." *See* 6 Phillip E. Areeda, *Antitrust Law* ¶¶ 1400 & 1403 at 3 & 17 (1986). The court will use the terms "conspiracy" and "agreement" interchangeably.

Recognizing every commercial agreement restrains trade in some respect, the Supreme Court has interpreted the meaning of Section 1 by finding that it only prohibits unreasonable restraints of trade. *See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289, 105 S.Ct. 2613, 2616 (1985) ("*Northwest Wholesale*"); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 243 (1918). Therefore, to establish a claim under Section 1 of the Sherman Act, a plaintiff must show: (1) there was a contract, combination, or conspiracy; (2) the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) the restraint affected interstate commerce. *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991) (citing *T.W. Elec. Serv. v. Pacific Elec. Contractors Assoc.*, 809 F.2d 626, 632-33 (9th Cir. 1987)).

Performance argues PADI is an association of competitors and therefore automatically meets the "conspiracy" or "agreement" requirement under Section 1 as a matter of law.[1] This argument is unconvincing. A trade association is not a "walking conspiracy" just because it involves collective action by competitors. *E.g., Wilk v. American Medical Ass'n*, 895 F.2d 352, 374 (7th Cir. 1990); *Consolidated Metal Prod. v. Amer. Petro. Institute*, 846 F.2d 184 (5th Cir. 1988) ("[A] trade association is not by its nature a 'walking conspiracy', its every denial of some benefit amounting to an unreasonable restraint of trade."). In *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3rd Cir. 1994), the court dealt with the liability of a trade association of wallpaper store owners. On the issue of whether the trade association's activities met the "agreement" requirement, the court stated:

> [I]n assessing whether a trade association (or any other group of competitors) has taken concerted action, a court must examine all the facts and circumstances to determine whether the action taken was the result of some agreement, tacit or otherwise, among members of the association.

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[1] Performance states:

> SRA and PADI are lead defendants in the present lawsuit, and each is an association of competing scuba retailers. Accordingly each defendant is a combination, satisfying the "contract, combination or conspiracy" element of Section One of the Sherman Act. . . .

Pltf's Motion at 7.

Id. at 1007-08. Therefore, the court will examine the facts presented by the parties to determine whether PADI's actions were the result of an agreement of its "members" to boycott Performance.[2] *See also Consolidated Metal Prod., supra,* at 294 n.30 ("[T]he mere showing of relationships between alleged conspirators is insufficient to imply a conspiracy; section 1 requires an actual agreement, explicit or implicit.").[3]

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[2] At oral argument, PADI's counsel contended PADI is not a "trade association." Scuba retailers, however, make up at least a portion of PADI's membership. Declaration of Hornsby ¶ 6. Therefore, PADI is at least analogous to a trade association as far as these members are concerned. For purposes of this motion, the court will deal with PADI as analogous to a trade association.

[3] The Supreme Court cases relied on by Performance are not to the contrary. Performance seems to assert the Supreme Court has held a trade association is automatically a "conspiracy" for purposes of Section 1 analysis, citing *FTC v. Superior Ct. Trial Lawyers Ass'n,* 493 U.S. 411, 110 S.Ct. 768 (1990); *FTC v. Indiana Federation of Dentists,* 476 U.S. 447, 106 S.Ct. 2009 (1986); *Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 102 S.Ct. 2466 (1982); and *National Society of Professional Engineers v. United States,* 435 U.S. 679, 98 S.Ct. 1355 (1978). However, the Court held the organizations in these cases subject to antitrust liability because they adopted particular anticompetitive policies. It was these anticompetitive policies which triggered antitrust liability, not the fact the organization was a combination of competitors. For instance, in *Indiana Federation of Dentists, supra,* the organization of dentists adopted a policy of refusing to submit patient x-rays to dental insurers. *Id.* at 451, 106 S.Ct. at 2009. The court's discussion of antitrust liability focuses entirely on the anticompetitive effects of this policy, not the organization itself. *Id.* at 457-65, 106 S.Ct. at 2017-21. In *Professional Engineers, supra,* the organization adopted a canon which declared it unethical for the member

As evidence of PADI's "agreement" or "conspiracy," Performance cites the following evidence in its various papers:

> (1) James McCullagh, a vice-president at Rodale Press, testified that PADI refused to supply its database to Rodale because it was getting pressure from its retailer members and other retailers to so refuse. McCullagh Deposition at 26, 37, 57-58.
>
> (2) C.K. Stewart, PADI's vice-president of marketing, wrote an internal memorandum to PADI's Executive Management Committee regarding a recent telephone conversation with Harry Truitt, a scuba retailer and a member of SRA's board of directors. In the memo, Stewart says Truitt said the problem with mail order is it lowers prices and forces the retailer to compete. Cronin Deposition Exhibit 12.[4]
>
> (3) John Cronin, PADI's CEO, testified he was concerned about Performance advertising in Rodale's *Scuba Diving* magazine because such advertising could hurt scuba retailers, upon whom PADI was dependent. Cronin Deposition at 37-40.
>
> (4) Mike Curry, Performance's President, testified a Rodale agent told him PADI had insisted

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engineers to engage in competitive bidding. The Court saw the issue as whether "an agreement among competitors" restrained competition unjustifiably. *Id.* at 692, 98 S.Ct. at 1365.

[4] PADI objects to thee statements as inadmissible hearsay. They do not, however, appear to be offered to prove the truth of the matter asserted, but rather the existence of an agreement or conspiracy between SRA and PADI. For this limited purpose, the court OVERRULES the objection.

Rodale refuse to accept any advertising from Performance for *Scuba Diving* magazine. The Rodale agent told Curry the SRA and its retailers were "squeezing" PADI, and in turn PADI was "squeezing" Rodale.[5]

(5) PADI's original contract with Rodale contained a provision requiring Rodale to "establish its advertiser policies in a manner that acknowledges that scuba equipment requires training for safe use, that Rodale supports the dive industry standard that scuba equipment should be sold only to certified divers who can provide proof of certification at the point of purchase." Exhibit A to Hornsby Declaration ¶ 10.

(6) McCullagh testified PADI "first discussed" the restriction on mail-order advertising by a letter to Rodale dated September 25, 1991. This letter states: "[w]e have a concern regarding direct response advertising that may be carried by the new scuba diving magazine. . . . It would be helpful if you could clarify your current plans and future policies in this regard. This issue will be pivotal to acceptance by the retailers." McCullagh also testified the mail order advertising policy was a "very low priority" to Rodale. McCullagh Deposition at 20, 31.

(7) McCullagh testified Rodale published its policy regarding mail order advertising on March 30, 1992. Pursuant to the terms of this policy, Rodale indicated it would not accept mail order advertisements for scuba life support equipment. According to McCullagh, this policy

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[5] Again, PADI objects these statements are inadmissible hearsay. This objection is SUSTAINED.

sparked a "massive" response from retailers to Rodale and PADI. As a result, Rodale adopted a new policy in document dated May 1, 1992. This document establishes Rodale's policy of refusing to accept any mail order advertisements. McCullagh Deposition at 36-38; Exhibits 1 and 6 to McAfee Deposition.

(8) In April 1992, McCullagh and Stewart exchanged letters regarding the fact Rodale had agreed to place a business reply card for Performance's catalog in the first issue of *Scuba Diving*. Stewart wrote McCullagh on April 17, 1992 to express PADI's concern about the fact Performance would be "advertised" in the first issue. Stewart wrote: "We are deeply troubled. . . . It is difficult for us to understand how Rodale interprets this to be consistent with language or spirit of [¶ 10]. Of greater concern is the perception of the PADI retailer. How can they be expected to believe that Rodale truly supports their concerns regarding the mail order sale of life support equipment." McCullagh responded on April 20, 1992 by asserting the first issue would not contain advertising, but just a business reply card for Performance. Stewart responded on the same day, expressing the view that if the card "offers an opportunity to purchase or order their catalog in any way," it violates ¶ 10. McCullagh Deposition Exhibits 5 and 6.

The court must review this evidence to determine whether it shows PADI entered into an agreement or conspiracy to boycott Performance. Beginning with item (1) above, McCullagh's testimony only shows PADI received pressure from SRA and retailers as a result of its

business with Rodale. It does not show PADI entered into an agreement to boycott Performance.

The Stewart memorandum (described in item (2)) does not tend to prove PADI entered into an agreement with anyone. According to Performance, this memorandum "connects PADI and its horizontal retail members with the SRA and its horizontal retail members in the conspiracy to boycott Plaintiff." This assertion is incorrect. All the memorandum shows is Truitt's statement about the "problem" with mail-order. This communication does not show an agreement or conspiracy.

Although Cronin's testimony indicates the reason for PADI's concern about Rodale's mail order advertising policy, it does not tend to prove PADI agreed to boycott Performance. In fact, Cronin testifies Rodale's decision to allow Performance to advertise was "not really" part of the reason PADI decided to end its contract with Rodale. Cronin Deposition at 40.

The remaining admissible testimony relates to PADI's contract with Rodale and the various forms of Rodale's anti-mail order advertising policies. The evidence shows PADI negotiated with Rodale for the anti-mail order advertisement provision because they were concerned with the effect a relationship with a mail order advertiser would have on their relationship with retailers.[6] The evidence also shows such a provision was ultimately part of

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[6] At oral argument, PADI's counsel asserted the undisputed evidence shows Rodale presented the terms of a "no mail order advertising" policy as part of its presentation to PADI. However, McCullagh's testimony tends to show PADI negotiated this provision with Rodale.

the PADI-Rodale contract. Finally, the evidence shows PADI complained to Rodale when it did something which PADI perceived as violating this provision. Whether this evidence is sufficient to create liability under Section 1 of the Sherman Act is unclear.

Performance argues PADI's contract with Rodale is a "classic 'contract' in restraint of trade in the form of a *per se* illegal group boycott." Pltf's Opposition at 9.[7] As authority for this argument, Performance cites a number of cases. However, these cases do not render a contract provision like paragraph 10 of the PADI-Rodale agreement *per se* unlawful. PADI's contract with Rodale is a contract between an entity analogous to a trade association related to the scuba retailing industry and a potential advertising source which precludes the advertising source from running certain advertisements. Many of the cases cited by Performance involve an agreement between competitors to refuse to deal with other firms with whom they have a vertical relationship. *E.g., Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 61 S.Ct. 703 (1941) (holding dress designers and manufacturers liable under Section 1 because they agreed not to sell to retailers who were dealing with "pirates"); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705 (1959) (holding manufacturers and distributors liable for conspiring with retailer to boycott the retailer's competitor).

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[7] Throughout its papers on these motions Performance does not raise any claim the evidence shows an unreasonable restraint of trade under a rule of reason analysis. As a result, the court finds Performance has abandoned any claim under the rule of reason and will only test for *per se* violations of Section 1 of the Sherman Act.

These cases are not applicable here; PADI and Rodale are not competitors and do not have a manufacturer-supplier relationship.

The court finds the undisputed facts do not raise a triable issue of an agreement between PADI and SRA to boycott Performance. Thus, the remaining question is whether there is a triable issue of an illegal group boycott as a result of the PADI-Rodale agreement and the negotiations surrounding it. The parties have not adequately briefed this issue.

Therefore, the parties are directed to submit additional briefing on the legal effect of the PADI-Rodale contract, whether it is an illegal group boycott, and whether it constitutes a *per se* violation of Section 1 of the Sherman Act. The filing dates for additional briefing are as follows (service by fax or personal delivery, not mail):

PADI opening – January 22, 1996

Plaintiff opposition – January 31, 1996

PADI reply – February 12, 1966

B. Count II: Section 2 of the Sherman Act

Count II of Performance's complaint alleges a claim for conspiracy to monopolize. Section 2 of the Sherman Act states: "Every person who shall monopolize or attempt to monopolize, or combine or conspire with any person or persons, to monopolize . . . trade shall be guilty" of an antitrust violation. 15 U.S.C. § 2. The elements of a conspiracy to monopolize are: (1) proof of concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the

commission of an overt act in furtherance of the conspiracy. *International Distribution Centers, Inc. v. Walsh Trucking*, 812 F.2d 786 (2d Cir. 1987).

According to a leading antitrust treatise, "[a]ny arrangement that could be considered a combination or conspiracy to monopolize must necessarily also be an unreasonable restraint of trade offending § 1." Areeda, 3 Antitrust Law, ¶ 839 at 358 (1978). Therefore, if a plaintiff fails to provide specific facts to support its conspiracy claims under Section 1, it cannot sustain a claim for violation of Section 2 under a conspiracy to monopolize theory. *See Computer Place, Inc. v. Hewlet Packard Co.*, 607 F.Supp. 822, 831 (N.D. Cal. 1984). However, the converse is not necessarily true; a plaintiff does not make an adequate showing of sufficient evidence to go to a jury on a Section 2 claim simply by showing triable issues of material fact on his Section 1 claims.

At this point, the court cannot conclude Performance's Section 2 claim fails as a matter of law. If the court concludes PADI's agreement with Rodale is an unlawful conspiracy in violation of Section 1 of the Sherman Act, this evidence alone could satisfy the elements of a Section 2 claim. The agreement would be proof of concerted action. The specific intent to achieve an unlawful monopoly could be inferred from the fact PADI entered into this agreement. The agreement could also satisfy the commission of an overt act in furtherance of the conspiracy element. Because the court has taken the Section 1 claim under submission pending further briefing by the parties, the court must do the same with PADI's motion on this count. Therefore, the motion for

summary judgment on this count of Performance's complaint is under submission.

C. Count III: The Cartwright Act

The Cartwright Act portion of Performance's complaint (Count III) alleges the same conduct alleged in Counts I and II under the federal Sherman Act. The California Supreme Court has held the Cartwright Act, California's antitrust statute, must be interpreted consistently with the federal Sherman Act. *Marin County Bd. of Realtors, Inc. v. Palsson,* 16 Cal.3d 920 (1976). If a Defendant is not liable under the Sherman Act, the Defendant is also not liable under the Cartwright Act.[8]

As noted above, the court has taken the cross-motions under Count I as well as the PADI's motion for summary judgment on Count II under submission pending additional briefing on the matter. As a result, the court will also take PADI's motion for summary judgment against Performance's Cartwright Act claims under submission.

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[8] At one point, Performance appears to suggest the Cartwright Act may impose liability for conduct not illegal under the Sherman Act, citing *California v. ARC America Corp.*, 490 U.S. 93, 109 S.Ct. 1661 (1989). Therein, the Supreme Court held the Cartwright Act's indirect purchaser law was not preempted by the Sherman Act. Therefore, the defendants could be liable under the Cartwright Act for conduct not illegal under the Sherman Act. However, this holding is not applicable to the facts of this case, because the Cartwright Act's indirect purchaser section is not at issue.

D. Count IV: Tortious Interference

In order to prove a claim of tortious interference with prospective economic advantage, the plaintiff must prove the following elements:

> (1) An economic relationship existed between the plaintiff and [a third party], containing a probable future economic benefit or advantage to plaintiff;
>
> (2) The defendant knew of the existence of the relationship;
>
> (3) The defendant intentionally engaged in acts or conduct designed to interfere with or disrupt this relationship;
>
> (4) The economic relationship was actually interfered with or disrupted; and
>
> (5) The acts of the defendant which were designed to interfere with or disrupt this relationship caused damage to the plaintiff.

BAJI 7.82 (Civil) (8th ed. 1994); *see also Summit Mach. Tool Mfg. v. Victor CNC Systems*, 7 F.3d 1434, 1442 (9th Cir. 1993).

Without citing any evidence, Performance simply states the "facts in the record" are sufficient to establish each of these elements. In opposition to this motion for summary judgment, Performance has the obligation to come forward with this evidence. Because it has failed to do so, the court must conclude it does not exist. As a result, the court GRANTS PADI's motion for summary judgment on Count IV of the complaint.

E. Count V: Unfair Competition

In Count V of the complaint, Performance alleges "the [] acts of defendants constitute unfair competition under state law." First Amended Complaint ¶ 63 at 25. Performance does not identify its theory of recovery or identify how these acts are unfair competition under California law. In response to this motion for summary judgment, it was Performance's obligation to come forward with evidence to prove its unfair competition claims. The court concludes it has failed to do so. Therefore, PADI's motion for summary judgment on Count V of the complaint is GRANTED.

F. Conclusion

PADI's motion for summary judgment is GRANTED as to Counts IV and V. The remaining motions (including Performance's cross-motion for summary judgment on Count I) are UNDER SUBMISSION pending additional briefing by the parties.

II. SCUBA RETAILERS ASSOCIATION

A. Count I: Section 1 of the Sherman Act

As was the case with PAD in part I above, the parties central dispute is over whether the evidence shows SRA has engaged in a "contract, conspiracy, or combination" as required by Section 1 of the Sherman Act. SRA argues the undisputed evidence shows it has conspired with no one else, *i.e.*, the equipment manufacturers, scuba magazines, or other trade associations like PADI. However,

Performance asserts the SRA members unlawfully conspired *Among themselves* to boycott Performance.

The legal standard to determine SRA's potential liability as a trade association was discussed in part I.A., above, where the court cited a Third Circuit case on whether a trade association's activities meet the "agreement" requirement of Sherman Act § 1:

> [I]n assessing whether a trade association (or any other group of competitors has taken concerted action, a court must examine all the facts and circumstances to determine whether the action taken was the result of some agreement, tacit or otherwise, among members of the association.

Alvord-Polk, supra, at 1007-08. Relying primarily on this case, the court determined it had to decide whether the trade association's actions were the result of an agreement of its members to boycott Performance.

Performance cites the following admissible evidence to make this claim:

> (1) The March 1992 issue of SRA's newsletter contains a reference to "find[ing] out what Rodale's policy is on mail order advertising."
>
> (2) The November/December 1992 of the newsletter contains a reference to SRA's "lobb[ying]" efforts to secure Rodale's promise to refuse to run mail order advertisements in its *Scuba Diving* magazine.
>
> (3) A member of the SRA's board of directors wrote in the Winter 1993 issue: "Our voice was heard loud and clear during negotiations with Rodale . . . resulting in a proclamation by

> Rodale to drop mail order advertising of any underwater equipment."
>
> (4) In the same issue, SRA's President wrote: "We welcome [Rodale] to the dive industry and applaud their decision not to run mail order ads of scuba equipment nor market their mailing list to 'for profit' corporations. . . . SRA thanks Rodale for their decision. . . . I personally want to thank the retailers, manufacturers, instructional agencies, and others who contributed to this effort. . . . The next step is simple. We, as retailers . . . should support Rodale's Scuba Diving to the fullest."

Additionally, Performance cites the evidence discussed in part I.A. regarding PADI's connection to the alleged conspiracy.

This evidence is sufficient only to create a triable issue of material fact on the issue. Neither side has successfully shown the undisputed facts prove either an agreement or lack of an agreement as a matter of law. Therefore, the court DENIES both motions for summary judgment.

B. Count II: Section 2 of the Sherman Act

Because the court has concluded there are triable issues of material fact on Performance's Section 1 claims, the court cannot conclude Performance's Section 2 claim fails as a matter of law. To prove a Section 2 claim, the plaintiff must show: (1) proof of concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy. *See* above Section I.B. If the evidence shows SRA conspired among themselves in violation of Section 1 of the Sherman Act, this evidence

alone could satisfy these elements. This evidence would be proof of concerted action. The specific intent to achieve an unlawful monopoly could be inferred from the SRA conspiracy. The evidence shows SRA members have engaged in various acts which could satisfy the overt acts in furtherance of the conspiracy element. Because all of the elements of a Section 2 claim have been satisfied, the court DENIES SRA's motion for summary judgment on this claim.

C. Count III: The Cartwright Act

Having concluded Performance's Section 1 and 2 claims presents triable issues of material fact, the court must reach the same conclusion with respect to Performance's Cartwright Act claim. *See supra*, part I.C. Therefore, SRA's motion for summary judgment on Count III is DENIED.

D. Count IV: Tortious Interference

In order to prove a claim of tortious interference with prospective economic advantage, the plaintiff must prove the following elements:

> (1) An economic relationship existed between the plaintiff and [a third party], containing a probable future economic benefit or advantage to plaintiff;
>
> (2) The defendant knew of the existence of the relationship;
>
> (3) The defendant intentionally engaged in acts or conduct designed to interfere with or disrupt this relationship;

> (4) The economic relationship was actually interfered with or disrupted; and
>
> (5) The acts of the defendant which were designed to interfere with or disrupt this relationship caused damage to the plaintiff.

BAJI 7.82 (Civil) (8th ed. 1994); *see also Summit Mach. Tool Mfg. v. Victor CNC Systems*, 7 F.3d 1434, 1442 (9th Cir. 1993).

Performance cites no evidence to establish each of these elements. In opposition to this motion for summary judgment, Performance has the obligation to come forward with this evidence. Because it has failed to do so, the court concludes it does not exist. As a result, the court GRANTS SRA's motion for summary judgment on Count IV of the complaint.

E. Count V: Unfair Competition

In Count V of the complaint, Performance alleges "the [ ] acts of defendants constitute unfair competition under state law." First Amended Complaint ¶ 63 at 25. Once again, in response to this motion for summary judgment, it was Performance's obligation to come forward with evidence to prove its unfair competition claims. Performance cites no evidence on this claim. Therefore, SRA's motion for summary judgment on Count V of the complaint is GRANTED.

F. Conclusion

SRA's motion for summary judgment is DENIED with respect to Counts I, II, and III, but GRANTED with

respect to Counts IV and V. Performance's cross-motion for partial summary judgment on Count I is DENIED.

III. PRINCETON TECTONICS

A. Count I: Section 1 of the Sherman Act

By order dated September 12, 1995, this court previously granted summary judgment in favor of two manufacturer defendants – EIT and Beuchat – on Plaintiff's Sherman Act § 1 claims. Because EIT and Beuchat are manufacturers and suppliers of scuba equipment, the court analyzed the cases as a vertical restraint. Therefore, the court applied the holdings of *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464 (1984); *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 108 S.Ct. 1515 (1988); and *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988).

Applying these cases, the court held:

> Under [*Monsanto* and *Jeanery*], to support a claim that EIT and Beuchat have violated § 1 of the Sherman Act, Plaintiff needs to point to something beyond the complaints to EIT and Beuchat from the scuba retailers. And as *Business Electronics* makes clear, there must be some evidence of an agreement on price or price levels.

Court's Order of September 12, 1995 at 4. Because Performance could not make such a showing, the court granted summary judgment in the favor of EIT and Beuchat on Performance's Section 1 claim.

Princeton Tectonics is, like EIT and Beuchat, a manufacturer and supplier of scuba equipment. Princeton's more popular products are its underwater flashlights. In all material respects, the allegations in Performance's complaint of Princeton's participation in the allegedly unlawful conspiracy are the same as the allegations directed against EIT and Beuchat. Therefore, the court's reasoning in the September 12, 1995 order applies with equal force to analysis of Princeton's motion for summary judgment.

Applying these rules, the undisputed evidence shows Princeton made the decision to not sell its product to Performance when Performance entered the scuba equipment business as a mail-order retailer in 1990. The testimony of Princeton's sales manager shows Princeton subsequently received warnings from various retailers to the effect they would stop buying Princeton product if Princeton sold to Performance.

Then, in 1992, the sales manager received a fax from Performance featuring Princeton products as they would be listed in a forthcoming edition of Performance's catalog. This made Princeton's sales manager "angry" because Performance was securing these products from another, unauthorized source. The sales manager contacted other light manufacturers featured in the catalog to see if they were indeed selling to Performance. After confirming they were not, the sales manager wrote a letter to its dealers reporting "problems with unauthorized distribution of our product line." To control this unauthorized distribution, the letter indicated it would be implementing a new authorized dealer program.

Thereafter, in response to threats of legal action from Performance, Princeton agreed to sell its TEC-4000 light to Performance. Princeton did not, however, agree to sell its popular Bottom light to Performance. According to the sales manager, Performance did not ask to buy the Bottom light.

The undisputed evidence shows Princeton is not liable under Section 1 of the Sherman Act as a matter of law. The undisputed evidence fails to show Princeton entered into any kind of agreement with retailers or other manufacturers to refuse to deal with Performance. In fact, the evidence shows Princeton has supplied Performance with equipment (both lights and other equipment) on a fairly consistent basis over the last few years. As a result, summary judgment is GRANTED in favor of Princeton on Count I of the Performance's complaint.

B. Count II: Section 2 of the Sherman Act

Because Performance fails to prove its conspiracy claims with respect to Count I, Count II also fails as a matter of law. *See supra* part I.B. Summary judgment is GRANTED in Princeton's favor with respect to Count II of Performance's complaint.

C. Count III: The Cartwright Act

A defendant's liability under the Cartwright Act is co-extensive with its liability under the federal Sherman Act. Therefore, if a defendant is not liable under the Sherman Act as a matter of law, the defendant is also entitled to judgment on the plaintiff's Cartwright Act

claim. *See supra* part I.C. Therefore, the court concludes Count III of Performance's complaint fails as a matter of law. Summary judgment is therefore GRANTED.

D. Count IV: Tortious Interference

In order to prove a claim of tortious interference with prospective economic advantage, the plaintiff must prove the following elements:

> (1) An economic relationship existed between the plaintiff and [a third party], containing a probable future economic benefit or advantage to plaintiff;
>
> (2) The defendant knew of the existence of the relationship;
>
> (3) The defendant intentionally engaged in acts or conduct designed to interfere with or disrupt this relationship;
>
> (4) The economic relationship was actually interfered with or disrupted; and
>
> (5) The acts of the defendant which were designed to interfere with or disrupt this relationship caused damage to the plaintiff.

BAJI 7.82 (Civil) (8th ed. 1994); *see also Summit Mach. Tool Mgf. v. Victor CNC Systems*, 7 F.3d 1434, 1442 (9th Cir. 1993).

Performance has failed to come forward with any evidence to show it can meet these elements with respect to Princeton. Relying primarily on its conclusory allegations of Princeton's participation in the boycott "conspiracy," Performance asserts the evidence of conspiracy

could lead a jury to find the requisite elements of tortious interference. The court disagrees, because Performance has presented no evidence to show Princeton took part in any conspiracy. As a result, the court finds Performance's tortious interference claim against Princeton is inadequate as a matter of law. Summary judgment is therefore GRANTED on this count of Performance's complaint.

E. Count V: Unfair Competition

In Count V of the complaint, Performance alleges "the [ ] acts of defendants constitute unfair competition under state law." First Amended Complaint ¶ 63 at 25. Performance asserts the acts of Defendants which underlie the other four counts also support the tort of unfair competition. However, as noted above, Performance has failed to prove the elements of its federal and state antitrust claims as well as its tortious interference claim. As a result, its unfair competition claim also fails as a matter of law. Summary judgment is therefore GRANTED.

F. Conclusion

Performance has failed to come forward with evidence to create a triable issue of fact against Princeton on all five counts of its complaint. Therefore, the court GRANTS summary judgment in Princeton's favor.

IV. SCUBA TIMES

A. Count I: Section 1 of the Sherman Act

The undisputed facts show *Scuba Times* rented its mailing list to Performance for two years. As a result, retailers threatened to boycott *Scuba Times* if it continued to rent its lists to Performance. In light of these threats, *Scuba Times* refused to rent its lists to Performance. Also, the publisher/editor of *Scuba Times* wrote a letter to the editor, printed in the November/December 1992 edition of SRA's *Scuba Retailer* newsletter, which refers to his magazine's support of dive stores for 14 years.[9] According to Performance, "th[is] evidence [ ] is sufficient from which to infer an agreement."

The court disagrees. The evidence is entirely consistent with the version of events put forward by *Scuba Times*. *Scuba Times* asserts it discontinued its relationship with Performance in order to enlarge its distribution and sell more magazines. They believed they could sell more magazines by no longer renting their mailing list to Performance because more retailers would then sell their magazines in their stores. The evidence entirely supports this explanation.

Moreover, the evidence does not show *Scuba Times* entered into any sort of agreement with the retailers.

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[9] Performance characterizes this letter as "communicating its support to the retail conspirators." Pltf's Opposition to Princeton/Scuba's Motion at 14. This conclusion requires a strained reading of the letter. The letter makes no reference to the recent decision by *Scuba Times* to stop renting its mailing list to Performance, as might be expected if this letter was communicating support to the retailers' conspiracy.

Beyond the decision to discontinue renting its mailing list to Performance, the court has been presented with no evidence, direct or circumstantial, tending to show the existence of any agreement between the *Scuba Times* and the retailers. Such evidence is necessary to prove Performance's Section 1 Sherman Act claim against *Scuba Times*. *See supra* Section III.A. (discussing the test for determine when a terminating dealer is liable for violating the Sherman Act).[10] As a result, in the absence of such evidence, the court GRANTS summary judgment in favor of *Scuba Times* on Count I of Performance's complaint.

B. Count II: Section 2 of the Sherman Act

Because Performance fails to prove its conspiracy claims with respect to Count I, Count II also fails as a matter of law. *See supra* part I.B. Summary judgment is therefore GRANTED in favor of *Scuba Times* with respect to Count II of Performance's complaint.

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[10] Performance cites *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939), to establish the evidence it has shown is sufficient to prove an agreement. This part of *Interstate Circuit* is inapplicable to this case. First, the evidence in *Interstate Circuit* showed the defendant-distributors knew concerted action was contemplated and invited and then adhered to the scheme and participated in it. Similar evidence is not before this court. Performance has presented no evidence tending to show *Scuba Times* was aware of the alleged conspiracy among the retailers. Also, the agreement found in *Interstate Circuit* was between competitors. *Scuba Times* is not a competitor in the retail market for scuba equipment.

C. Count III: The Cartwright Act

Because *Scuba Times* is not liable under the Sherman Act, Performance's Cartwright Act claim (Count III) also fails as a matter of law. *See supra* part I.C. Summary judgment is therefore GRANTED in favor of *Scuba Times* on Count III of Performance's complaint.

D. Count IV: Tortious Interference

As noted above, *supra* part III.D., Performance has the burden of coming forward with evidence to prove the elements of its tortious interference claim. Relying primarily on its conclusory allegations of *Scuba Times'* participation in the boycott "conspiracy," Performance asserts the evidence of conspiracy could lead a jury to find the requisite elements of tortious interference. The court disagrees, because Performance's has presented no evidence to show *Scuba Times* took part in any conspiracy. As a result, the court GRANTS summary judgment in favor of Princeton on Performance's tortious interference claim.

E. Count V: Unfair Competition

In Count V of the complaint, Performance alleges "the [ ] acts of defendants constitute unfair competition under state law." First Amended Complaint ¶ 63 at 25. Performance asserts the acts of Defendants which underlie the other four counts also support the tort of unfair competition. However, as noted above, Performance has failed to prove the elements of its federal and state antitrust claims as well as its tortious interference claim. As a

result, its unfair competition claim also fails as a matter of law. Summary judgment is therefore GRANTED.

F. Conclusion

Performance has failed to come forward with evidence to create a triable issue of fact against *Scuba Times* on all give counts of its complaint. Therefore, the court GRANTS summary judgment in favor of *Scuba Times* on all five counts.

V. SAL ZAMMITTI

A. Count I: Section 1 of the Sherman Act

Performance asserts Zammitti is liable for the violations of Section 1 of the Sherman Act committed by the SRA. Performance shows Zammitti was a member of the SRA board of directors from 1990 to 1994. *See, e.g.*, Holston Deposition Exhibits 1-19.

The Supreme Court has recently addressed the liability of trade associations in two cases. In *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 102 S.Ct. 1935 (1982) ("*Hydrolevel*"), the court held the American Society of Mechanical Engineers (ASME) was liable for the unauthorized conduct of two experts serving on an ASME committee which promulgated industry product standards. These experts were improperly interpreting a standard to the detriment of plaintiff and in favor of their employers. To encourage the organization to supervise those who acted with apparent authority on its behalf, the Supreme Court

imposed liability upon the entire ASME. In *National Society of Prof'l Engrs. v. United States*, 435 U.S. 679, 98 S.Ct. 1355 (1978), the Supreme Court held a professional organization of engineers liable for adopting a canon which declared it unethical for its members to engage in competitive bidding.

Performance attempts to invert the reasoning of these cases by arguing Zammitti is liable for the antitrust violations committed by the SRA. Members of trade associations are not automatically liable for the actions of the association. "There must [ ] be some evidence of actual knowledge of, and participation in, an illegal scheme in order to establish a violation of the antitrust laws by a particular member." *Moore v. Boating Industry Ass'ns*, 819 F.2d 693, 712 (7th Cir. 1987); *see also Kline v. Coldwell Banker & Co.*, 508 F.2d 226, 232 (9th Cir. 1974) ("in order for a member of a trade association to become guilty in a criminal case or liable in a treble damage case he must have knowingly, intentionally, and actively participated in an individual capacity in the scheme").

Beyond Zammitti's seat on the SRA board of directors, Performance cites evidence which indicates Zammitti may have contacted one of Princeton's competitors. According to the account, Zammitti phoned the manufacturer to complain about the manufacturer's relationship with Performance. Thus, the question before the court is whether this evidence is sufficient to create at least a jury issue on whether Zammitti had actual knowledge of or actually participated in the allegedly illegal scheme.

The court concludes it is. As an active long-time member of SRA's board of directors, Zammitti was presumably aware of the issues of concern to the organization. Mail-order advertising is frequently mentioned in the organization's newsletter. Therefore, the court concludes Performance has created a triable issue on Zammitti's liability under Section 1. Summary judgment is DENIED.

B. Count II: Section 2 of the Sherman Act

As was the case with SRA, the evidence which creates triable issues of material fact on Performance's Section 1 claims also creates triable issues of material fact on the Section 2 claims. The evidence which shows Zammitti entered into an agreement to boycott Performance may satisfy the elements of a Section 2 claim. *See* above Sections I.B. and II.B. Therefore, the court DENIES Zammitti's motion for summary judgment on Performance's Section 2 claim.

C. Count III: The Cartwright Act

A defendant's liability under the Cartwright Act is co-extensive with its liability under the federal Sherman Act. Therefore, if a defendant is not liable under the Sherman Act as a matter of law, the defendant is also entitled to judgment on the plaintiff's Cartwright Act claim. *See* above part I.C. However, because Count I survives the motion for summary judgment, the court DENIES the motion for summary judgment on Count III.

D. Count IV: Tortious Interference

As was the case with the SRA, *see* part II.D., Performance makes no attempt to present evidence to support its claim of tortious interference. As a result, the court GRANTS summary judgment in Zammitti's favor on Count IV of Performance's complaint.

E. Count V: Unfair Competition

As was the case with the SRA, *see* part II.E., Performance makes no attempt to present evidence in support of its claim of unfair competition. As a result, the court GRANTS summary judgment in Zammitti's favor on Count V of Performance's complaint.

F. Conclusion

The court DENIES Zammitti's motion for summary judgment as to Counts I, II, and III of Performance's complaint, but GRANTS Zammitti's motion for summary judgment as to Counts IV and V.

DATED: 1-10-96

/s/ Gary L. Taylor
GARY L. TAYLOR
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NOVA DESIGNS, INC. d/b/a PERFORMANCE DIVER, Plaintiff, vs. SCUBA RETAILER ASSOCIATION; INTERNATIONAL PADI, INC., and PROFESSIONAL ASSOCIATION OF DIVE INSTRUCTORS; ELECTRONICS INSTRUMENTATION & TECHNOLOGY INCORPORATED, and EIT MANUFACTURING; PRESS-ENTERPRISE, INC., and UNDERWATER USA, INC.; UNDERWATER KINETICS; PRINCETON TECTONICS; SCUBA TIMES; AND, BEUCHAT USA, INC., ROBERT HOLSTON; HARRY TRUITT; SAL ZAMMITTI; JAMES ESTABROOK Defendants.	) Case No. SA CV 94-0875 GLT (EEx) ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT ELECTRONIC INSTRUMENTATION AND TECHNOLOGY, INC.; GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BEUCHAT USA, INC. (Filed Sep. 12, 1995)

Plaintiff, a mail-order retailer of scuba diving equipment, asserts federal antitrust and state law claims after sales to plaintiff were stopped in response to pressure from scuba retailers and dive shop owners.

Defendant EIT's motion for summary judgment is GRANTED. Defendant Beuchat's motion for summary judgment is GRANTED as to Count I of the First Amended Complaint, but DENIED as to the remaining Counts.

COUNT I – § 1 OF THE SHERMAN ACT

Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. . . . " 15 U.S.C. § 1. Plaintiff alleges the various Defendants violated Section 1 by conspiring to eliminate price competition, conspiring to unreasonably limit consumer choice and to reduce competition in sales to consumers, and a concerted refusal to deal or group boycott.

In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464 (1984), the Supreme Court defined when antitrust liability would be imposed when a manufacturer terminated a price-cutting dealer in response to complaints from other dealers. To establish liability under § 1 of the Sherman Act, it is not sufficient for the antitrust plaintiff merely to show the manufacturer terminated a distributor following complaints from other distributors:

> [S]omething more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting

> independently. . . . [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."

Id. at 764, 104 S.Ct. at 1471. In a footnote, the court elaborated on what it meant by "a common scheme," stating evidence must be presented both that the distributor communicated its acquiescence or agreement and that this was sought by the manufacturer. *Id.* at 764 n.9, 104 S.Ct. at 1471 n.9.

The Court returned to this area four years later in *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 108 S.Ct. 1515 (1988). There, the Court emphasized that a manufacturer does not commit a per se violation of the antitrust laws by entering into an agreement with a requesting distributor to terminate a price-cutter "unless [the agreement] includes some agreement on price or price levels." *Id.* at 735-36, 108 S.Ct. at 1525.

The Ninth Circuit applied *Monsanto* and *Business Electronics* in *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988). In *Jeanery*, a jeans manufacturer terminated plaintiff retail dealer in response to complaints from other retailers that the plaintiff had been cutting prices. The record at trial produced evidence of at least four complaints from other retailers, and assurances from the manufacturer that it would "take care of things." *Id.* at 1157-58. The court held that this evidence was insufficient as a matter of law to sustain a jury verdict. *Id.* at 1161 ("The present case rests on circumstantial evidence

that does not support a reasonable inference of concerted behavior.").

Faced with this precedent, Plaintiff argues it is not applicable. According to Plaintiff, this case involves a horizontal conspiracy among competitors, i.e., the dive shop retailers. The acquiescence of suppliers and manufacturers like EIT and Beuchat is not sufficient to strip this conspiracy of its horizontal nature. Thus, *Jeanery* and *Monsanto* are inapplicable. In support of this proposition, Plaintiff cites *Denny's Marina, Inc. v. Renfro Productions, Inc.* 8 F.3d 1217 (7th Cir. 1993).

However, several circuit courts have issued opinions in cases involving the termination of a mail-order retailer by a manufacturer in response to complaints from other retailers, and those cases have followed *Monsanto/Business Electronics. See, e.g., National Marine Electronic Distributors, Inc. v. Raytheon Co.*, 778 F.2d 190 (4th Cir. 1985); *Bailey's Inc. v. Windsor America, Inc.*, 948 F.2d 1018 (6th Cir. 1991).

Under the Sherman Act, "horizontal restraints" are agreements between competitors at the same level of market structure, and "vertical restraints" are combinations of persons at different levels of market structure. *Bailey's*, 948 F.2d at 1027. Essentially, Plaintiff's complaint alleges elements of both. Plaintiff alleges agreements between various dive shop owners and/or scuba retailers – horizontal agreements making up a possible horizontal restraint. However, EIT and Beuchat are both manufacturers and suppliers of scuba equipment. They are not involved at the retail level. Thus, an agreement between EIT or Beuchat and the scuba retailers would be a vertical

agreement, and thus, a vertical restraint. *Denny's* notwithstanding, the better view is to look at this case as a vertical restraint. Thus, the court will apply *Monsanto* and *Jeanery*.

Under those precedents, to support a claim that EIT and Beuchat have violated § 1 of the Sherman Act, Plaintiff needs to point to something beyond the complaints to EIT and Beuchat from the scuba retailers. And as *Business Electronics* makes clear, there must be some evidence of an agreement on price or price levels.

Plaintiff cites the deposition of JOE MAY to prove that EIT reached an agreement with the scuba retailers to stop selling products to Performance Diver:

> Q: What I want to know is, for those complaints, what did EIT tell the complaining retailers?
>
> A: There was never a script prepared to respond to them, but the sense of the response was we are selling to Performance Diver, and although we understand your complaint, we're selling to Performance Diver.
>
> Q: In mid-March, you made the decision to no longer sell to Performance Diver, correct?
>
> A: That's correct.
>
> Q: Did the fact you got complaints from dealers, complaints about EIT selling to Performance Diver, did those complaints in any way weigh in your decision to not sell to Performance Diver?
>
> A: They weighed in the decision.

May deposition, p. 50. Viewing this excerpt in the light most favorable to Plaintiff, it does not provide any support for the conclusion that EIT reached an agreement

with the scuba retailers to stop selling to Performance Diver. Rather, this excerpt simply provides support for EIT's version of events: EIT stopped selling product to Plaintiff, and customer complaints were a factor. The Supreme Court made it clear in *Monsanto* and *Business Electronics* that those facts alone are insufficient to trigger antitrust liability.

Plaintiff also points to several letters written by EIT to scuba retailers association newsletters and individual dealers in which the termination of EIT's relationship with Performance Diver is related. Again, these letters do not provide any support for the conclusion EIT reached an agreement with the scuba retailers to stop selling to Performance Diver.

Viewing this evidence in the light most favorable to Plaintiff, Plaintiff is unable to establish the existence of concerted action between EIT and the scuba retailers. Thus, Plaintiff has been unable to present facts which trigger antitrust liability under the applicable precedent. Plaintiff has shown no direct or circumstantial evidence reasonably tending to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 764, 104 S.Ct. at 1471. Plaintiff has had considerable opportunity to take discovery to establish these elements. As a result, this court grants summary judgment in favor of EIT on Count I of Plaintiff's complaint.[1]

---

[1] Plaintiff argues the Supreme Court case of *United States v. General Motors Corp.*, 384 U.S. 127, 86 S.Ct. 1321 (1965) is directly

Plaintiff's evidence with respect to Beuchat is similar. Plaintiff points to the deposition of Beuchat's President and to several documents to establish that Beuchat was motivated, at least in part, to stop selling to Plaintiff because of complaints from other retailers. Plaintiff also points to a fax from Beuchat to an independent sales representative in which Beuchat indicates it has ended its relationship with Plaintiff. However, under *Monsanto* and *Jeanery*, these showings are simply insufficient as a matter of law. This court grants summary judgment in favor of Beuchat on Count I of Plaintiff's complaint.[2]

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on point. This court disagrees. *General Motors* involved a group of Chevrolet dealers participating in a campaign with General Motors to prevent discount houses and referral services from obtaining Chevrolet cars from any source. Together with the dealers via their trade associations, General Motors undertook a "joint venture" to make sure these discounters had no source of supply. The manufacturer Defendant in this case undertook no such joint venture to eliminate Plaintiff's source of supply. Thus, *General Motors* is inapplicable. *See Bailey's, Inc. v. Windsor America, Inc.*, 948 F.2d 1018, 1030-32 (6th Cir. 1991). Defendant EIT simply decided to terminate Plaintiff as a dealer of the ORCA dive computers. While complaints from other scuba retailers was a factor in Defendant's decision, that is not a basis for antitrust liability. *See Monsanto, supra*, at 764, 104 S.Ct. at 1471.

[2] Defendant Beuchat asks this court to grant summary judgment on all counts, but only argues for summary judgment as to Count I of Plaintiff's complaint. At this point, the court will only grant summary judgment as to Count I. Thus, the remaining discussion will focus on Defendant EIT's motion for summary judgment as to the remaining Counts.

COUNT II – § 2 OF THE SHERMAN ACT

Section 2 of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize . . . trade shall be guilty" of an antitrust violation. 15 U.S.C. § 2. The elements of a conspiracy to monopolize are: (1) proof of concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy. *International Distribution Centers, Inc. v. Walsh Trucking*, 812 F.2d 786 (2d Cir. 1987).

According to a leading antitrust treatise, "[a]ny arrangement that could be considered a combination or conspiracy to monopolize must necessarily also be an unreasonable restraint of trade offending § 1." Areeda, 3 Antitrust Law, ¶ 839 at 358 (1978). Thus, if EIT did not violate § 1, it probably has not violated § 2.

Defendant EIT argues Plaintiff has failed to produce any evidence tending to show EIT is engaged in any relevant product market. EIT argues it is not engaged in the retail market for scuba equipment; rather, it is a manufacturer of scuba equipment. Plaintiff relies on the same evidence it relied on to prove its § 1 claim in order to successfully create a jury issue on the elements listed above. However, Plaintiff does nothing to rebut EIT's showing that it is not engaged in the relevant product market. Additionally, Plaintiff can point to no evidence tending to show a conspiracy to monopolize or that EIT has the specific intent to monopolize. Based on the facts presented by Plaintiff, EIT made a decision to stop selling

to Plaintiff in response to complaints from other customers. Termination of Plaintiff was not sufficient by itself to create liability under Section 1 of the Sherman Act, and it is not enough to create liability under Section 2. Thus, this court grants summary judgment on Count II in favor of EIT.

COUNT III – CARTWRIGHT ACT

The California Supreme Court has held the Cartwright Act, California's antitrust statute, must be interpreted consistently with the federal Sherman Act. *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal.3d 920 (1976). Because Plaintiff's allegations in Counts I and II do not violate the Sherman Act, they do not constitute violations of the Cartwright Act. The court grants summary judgment in favor of Defendant EIT as to Count III.

COUNT IV – TORTIOUS INTERFERENCE

Plaintiff's allegations appear to state a claim of intentional interference with prospective economic advantage. In order to prove such a claim, a plaintiff has to prove five essential elements:

> (1) An economic relationship existed between the plaintiff and [a third party], containing a probable future economic benefit or advantage to plaintiff;
>
> (2) The defendant knew of the existence of the relationship;
>
> (3) The defendant intentionally engaged in acts or conduct designed to interfere with or disrupt this relationship;

(4) The economic relationship was actually interfered with or disrupted; and

(5) The acts of the defendant which were designed to interfere with or disrupt this relationship caused damage to the plaintiff.

BAJI 7.82 (Civil).

Defendant EIT argues Plaintiff has failed to come forward with evidence to prove these elements. Plaintiff responds by claiming it has come forward with evidence to link EIT with a conspiracy to interfere with Plaintiff's business relations.

Plaintiff bears the burden of proof as to the elements outlined above. EIT asserts the absence of evidence to prove the elements outlined above, and points to specific places in the deposition of Mr. Curry (Plaintiff's President) where he is unable to provide any testimony. Plaintiff's response on these points is little more than conclusory allegations of a "conspiracy." At this late stage, that is not sufficient. The court grants summary judgment in favor of Defendant EIT on Count IV.

COUNT V – UNFAIR COMPETITION

Plaintiff alleges Defendants' acts constitute unfair competition under state law. As with the interference with prospective economic advantage count discussed above, Plaintiff has not come forward with anything but conclusory allegations concerning EIT's participation in a "conspiracy" to substantiate this count. As a result, the court grants summary judgment in favor of EIT on Count V.

Defendant EIT's motion for summary judgment is GRANTED. Defendant Beuchat's motion for summary judgment is GRANTED as to Count I of the First Amended Complaint, but DENIED without prejudice as to the remaining Counts.

DATED: 9/12/95

/s/ G. L. Taylor
GARY L. TAYLOR
UNITED STATES
DISTRICT JUDGE

APPENDIX E

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NOVA DESIGNS, INC. d/b/a PERFORMANCE DIVER, Plaintiff, v. SCUBA RETAILER ASSOCIATION; INTERNATIONAL PAID, INC., AND PROFESSIONAL ASSOCIATION OF DIVE INSTRUCTORS; ELECTRONICS INSTRUMENTATION & TECHNOLOGY INCORPORATED,	)	CASE NO. SA CV 94-0875 GLT (EEx) ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT BEUCHAT USA, INC.

and EIT MANUFACTURING; PRESS-ENTERPRISE, INC., and UNDERWATER USA, INC.; UNDERWATER KINETICS; PRINCETON TECTONICS; SCUBA TIMES; AND BEUCHAT USA, INC., ROBERT HOLSTON; HARRY TRUITT; SAL ZAMMITTI; JAMES ESTABROOK, Defendants.	)	(Filed Sep 19, 1995)

On September 12, 1995, the Court granted defendant EIT's motion for summary judgment and granted defendant Beuchat USA, Inc.'s motion for summary judgment as to Count I, but did not grant summary judgment in Beuchat's favor in respect to Counts II, III and IV because it did not appear that Beuchat had adequately argued for summary judgment on those counts. *See* Order dated September 12, 1995 at 6 n.2.

On September 12, 1995, plaintiff and Beuchat filed a stipulation with the Court. The parties stipulated that Beuchat was adopting by reference EIT's notice of motion and motion, and all arguments and evidence in support of that motion with respect to Counts II, III and IV. Plaintiff and Beuchat further stipulated that plaintiff opposed Beuchat's motion for summary judgment on Counts II, III and IV on the same grounds and bases as plaintiff had opposed the motion for summary judgment made by defendant EIT.

In light of that stipulation, and for the reasons expressed in this Court's Order dated September 12, 1995

at 6-9, the Court grants Beuchat's motion for summary judgment on Counts II, III and IV, as well as Count I.

Defendant Beuchat's motion for summary judgment is therefore GRANTED in its entirety.

DATED: September 19, 1995

/s/ GARY L. TAYLOR
Gary L. Taylor
United States
District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOVA DESIGNS, INC. d/b/a PERFORMANCE DIVER, Plaintiff, vs. SCUBA RETAILERS ASSOCIATION, et al., Defendant.	)	Case No. SA CV 94-0875 GLT (EEx) JUDGMENT (Filed Oct 17 1995)

This action came on for hearing before the Court on Defendant Electronic Instrumentation & Technology, Inc.'s Motion for Summary Judgment. The evidence presented having been fully considered, the issues having been duly heard, a decision having been duly rendered, and the court having expressly determined there is no just reason for delay of entry of a final judgment as to the Defendant Electronic Instrumentation & Technology, Inc.:

IT IS ORDERED AND ADJUDGED Plaintiff take nothing, the action be dismissed on the merits as to Defendant Electronics Instrumentation & Technology, Inc., and Defendant Electronic Instrumentation & Technology, Inc. recover from Plaintiff its costs in the amount of _____.

DATED: 10/17/95

/s/ Gary L. Taylor
GARY L. TAYLOR

UNITED STATES
DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOVA DESIGNS, INC., d/b/a PERFORMANCE DIVER, Plaintiff-Appellant, vs. SCUBA RETAILERS ASSOCIATION, et al., Defendants-Appellees.	No. 95-56716 DC# CV-94-875-GLT Central California (Santa Ana) ORDER (Filed Mar 11 1996)

Before: Peter L. Shaw, Appellate Commissioner

Appellant's motion to stay the appeal pending final resolution of the district court claims is denied.

The briefing schedule shall be reset as follows: appellant's brief is due April 1, 1996; the answering brief is due May 1, 1996; the optional reply brief is due 14 days from service of the answering brief.

/s/ Peter L. Shaw
General Order 6.3(e)

Supreme Court, U.S.
FILED
OCT 27 1997

No. 97-544

In The Supreme Court Of The United States

OCTOBER TERM 1997

NOVA DESIGNS, INC., d/b/a PERFORMANCE DIVER,

Petitioner,

v.

ELECTRONICS INSTRUMENTATION AND TECHNOLOGY, INCORPORATED, and BEUCHAT USA, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT ELECTRONIC INSTRUMENTATION AND TECHNOLOGY, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision by the Court of Appeals unanimously affirming the entry of a final summary judgment against all of Petitioner's claims once Petitioner failed to present any triable issue of fact in this routine anti-trust case presents a conflict between any of the United States Courts of Appeal on any important matter or so far departs from the accepted and usual course of judicial proceedings as to mandate review by this Court.

PARTIES TO THE PROCEEDING

Respondent, Electronic Instrumentation & Technology, Inc. (hereinafter "EIT" or "Respondent"), is a manufacturer of electronic instruments including dive computers. Petitioner, Nova Designs, Inc., d/b/a Performance Diver, (hereinafter "Performance Diver" or "Petitioner") is an affiliate corporate of Performance, Inc.. Performance Diver sells scuba diving clothing and equipment through mail order catalogs.

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STATEMENT OF THE CASE

According to the undisputed facts before the District Court, Respondent, Electronic Instrumentation and Technology, Inc. ("EIT"), a new manufacturer of dive computers, agreed to distribute its Orca brand of dive computers through sales to Performance Diver for mail order catalog resale. As part of this arrangement, EIT agreed to provide Performance Diver with a computer disk containing all of the warranty information, including customer names, arising out of prior sales of Orca computers through its retail dealers. Performance Diver ostensibly was to use this information to increase its mailing list, and thus secure a wider distribution of the Orca dive computers. EIT agreed to try this new channel of distribution as an experiment, but reserved the right to discontinue sales to Performance Diver if these sales eroded EIT's network of retail dealers.

Some time in early 1992, the Performance Diver mail order operation prepared mailing list labels for distribution of

new catalogs featuring Orca dive computers. Through some mistake, Performance Diver's catalogs contained not only the name of the retail scuba customer who had purchased the Orca computer, but also the name of the retail dive store from which the computer had been purchased. This implied that EIT's retail dealers had somehow endorsed Performance Diver's mail order catalog. EIT's retail dealers were incensed by this development, and complained to EIT.

Faced with a serious erosion in its traditional retail network, EIT simply decided to discontinue its experiment of selling dive computers through Performance Diver. Several years later, Performance Diver brought suit against EIT and several other manufacturers of scuba equipment and against a number of retail trade groups including the Scuba Retailers Association, contending that EIT's decision to discontinue sales to Performance Diver was the product of a group boycott adopted as a conspiracy in violation of Section 1 of the Sherman Act. After a year of discovery, and in response to EIT's Motion for Summary Judgment, Performance Diver

was required to come forward with some evidence, either linking EIT to a conspiracy among other manufacturers, or establishing that EIT had participated directly in a vertical conspiracy with the scuba retailers to fix or stabilize prices.

Faced with this challenge, Performance Diver simply was incapable of producing any proof on these key issues. District Court Judge Taylor thus correctly concluded that EIT's conduct was as consistent with legitimate conduct as with an inference of conspiracy, and appropriately granted summary judgment in EIT's favor. Per Judge Taylor's Order of September 12, 1995:

> Something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently. The anti-trust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."

Because this decision effectively disposed of Performance Diver's entire case against EIT, on October 19, 1995, Judge

Taylor certified entry of a final judgment pursuant to Federal Rule of Civil Procedure 54(b).

The Ninth Circuit Court of Appeals ("Ninth Circuit") unanimously affirmed this decision, finding that:

> Performance has failed to present evidence that EIT, Beuchat, or Princeton joined a conspiracy, let alone entered into an agreement on price or price levels. The evidence of the conduct of each of these defendants is at least as consistent with permissible competition as with illegal conspiracy. Receiving complaints about Performance is not enough to support an inference of conspiracy, even if the termination of business relations with Performance was in response to those complaints. [citing Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 758 (1984); Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1156 (9th Cir. 1988)]

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The Court of Appeals' decision was thus in accord with every other federal anti-trust decision involving mail order sales and dealer complaints, or similar distribution arrangements. See National Marine Elec. Distribs., Inc. v. Raytheon Co., 778 F.2d 190 (4th Cir. 1986); Bailey's, Inc. v.

Windsor Am., Inc., 948 F.2d 1018 (6th Cir. 1991); See also KMB Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123 (2nd Cir. 1995); Garment Dist., Inc. v. Belk Stores Servs., Inc., 799 F.2d 905 (4th Cir. 1986); Jeanery, 849 F.2d at 1156.

ARGUMENT

EIT opposes issuance of the Writ of Certiorari sought by Performance Diver. This routine anti-trust case was correctly evaluated by the District Court and unanimously affirmed by the Court of Appeals under this Court's well-settled decisions.

Accordingly, the case presents no novel issues, nor any conflicts between the Circuits on any underlying issue—much less any important issue. Moreover, the decision is completely in accord with the "accepted and usual course of proceedings" under this Court's teachings. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1985); Business Elec. Corp. v. Sharp Elec., 485 U.S. 717, 724

(1988); Monsanto, 465 U.S. at 763-64. Accordingly, the petition should be denied.

I.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS CONCERNING THE PROPER APPLICATION OF RULE 54(b) AND THE PROCEDURES TO BE FOLLOWED BY THE DISTRICT COURT

In an effort to find a discrepancy between the Circuits, Petitioner has argued that there is a conflict between the Ninth Circuit and the Eleventh Circuit Court of Appeals ("Eleventh Circuit"), with respect to the proper procedures to be followed by a district court in certifying a judgment under Rule 54(b). This is not an important issue requiring Supreme Court intervention; even if it were, however, there is no conflict and no misapplication of Rule 54(b) under the circumstances presented here.

Both the Ninth and the Eleventh Circuits follow an identical rule, i.e., that in certain circumstances, particularly where it is not obvious that a case should be properly certified

under Rule 54(b), a trial court certifying a judgment as final under Rule 54(b) should state its reasons therefor. Alcan Alum. Corp. v. Carlsberg Fin. Corp., 689 F.2d 815 (9th Cir. 1982); Sheehan v. Atlanta Int'l Ins. Co., 812 F.2d 465, 468 n.1 (9th Cir. 1987); Rutman Wine Co. v. E. & J. Gallo Winery, 829 F. 2d 729, 729 (9th Cir. 1987); Ebrahimi v. City of Huntsville Board of Education, 114 F.3d 162 (11th Cir. 1997). Thus, there is no conflict between the Ninth and Eleventh Circuits on this issue.

More fundamentally, as both the District Court and the Ninth Circuit recognized below, the reason for certifying a final judgment under Rule 54(b) was obvious from the face of the Complaint and the proceedings before the District Court. The District Court's summary judgment ruling in September, 1995, and subsequent entry of a final summary judgment for EIT in October, 1995, disposed totally of all six counts filed by Performance Diver against EIT. It is true that EIT had maintained a separate counterclaim against Performance Diver based on different theories of liability; however, this

claim had an independent basis of federal jurisdiction and could have been prosecuted independently. Indeed, if it had so chosen, EIT could have brought this claim against Performance Diver in entirely separate litigation. Once the Court had decided that Performance Diver's accusations against EIT were insufficient as a matter of law, EIT was entitled to have that decision affirmed on appeal (if the Plaintiff elected to appeal), rather than have this issue remain unresolved for months or even years.

In short, there is no conflict and, in any event, Rule 54(b) was properly applied. There is no controlling novel or important federal question to be presented to this Court. In fact, the decisions below properly applied this Court's precedents.

II.

THE PETITION MISSTATES BOTH FACT AND LAW BY ASSERTING THAT IN RULING UPON THE PROPRIETY OF JUDGE TAYLOR'S ENTRY OF SUMMARY JUDGMENT FOR EIT THIS COURT SHOULD CONSIDER MATTERS THAT WERE NOT INCLUDED IN THE RECORD BEFORE THE DISTRICT COURT AT THE TIME IT GRANTED SUMMARY JUDGMENT TO EIT AND BY CHARACTERIZING JUDGE TAYLOR'S LATER REFUSAL TO GRANT OTHER PARTIES' SUMMARY JUDGMENT MOTIONS AS A "FINDING" THAT A PRE-EXISTING CONSPIRACY EXISTED

Pursuant to Rule 15 of the Supreme Court Rules, a brief in opposition to a petition for writ of certiorari must address misstatements of fact or law contained in the petition that may impact the issues that would properly be before the Court if certiorari were granted. Much of Performance's argument in the petition is based upon two faulty and misleading premises: (1) that simply because Judge Taylor denied summary judgment in favor of a scuba trade association on January 10, 1996, he somehow had found evidence of the existence of a "horizontal conspiracy"; and (2) that this subsequent ruling somehow taints or discredits his

prior judgment in favor of EIT entered months earlier, on September 12, 1995. Given the current stage of this litigation, counsel for Performance Diver must be aware that each of the above premises is entirely devoid of both legal and factual merit. This Court should reject these assertions, and deny the petition.

Taking the latter argument first, it is well settled that a ruling on a summary judgment motion must be based solely on the pleadings, the deposition testimony, and the affidavits, if any, that constitute the record before the district court at the time of decision. The Ninth Circuit has noted, "as an appellate court, our review is limited to the record presented to the district court at the time of summary judgment." E.g., Schneider v. County of San Diego, 28 F.3d 89 (9th Cir. 1994); see also U.S.A. Petroleum Co. v. Atlantic Richfield Co., 13 F.3d 1276, 1279 (9th Cir. 1994) (only the record before the District Court is normally considered; the summary judgment record cannot be supplemented on appeal).

Other circuits apply the same rule. For instance, the

Eleventh Circuit case of Clinkscales v. Chevron U.S.A, Inc., 831 F.2d 1565 (11th Cir. 1987) is instructive on the issue of what evidence is relevant to Judge Taylor's granting of summary judgment for EIT. In Clinkscales, certain testimony was produced at a preliminary injunction hearing, but not transcribed until after the district court ruled on a summary judgment motion. Id. at 1570. The Court held that, in order for the appellant to rely upon this evidence in arguing that the summary judgment was improperly granted, appellant must have produced a written transcript of the hearing to the trial judge before it made its ruling on the summary judgment motion. The Eleventh Circuit went on to explain:

> [T]he district judge need not consider evidence produced at a hearing almost two years prior to the court's ruling on the summary judgment motions where the hearing was not transcribed and made part of the record until after the court ruled and a notice of appeal was filed. Given our conclusion that testimony at the preliminary injunction hearing in this case was not part of the record properly before the district court in ruling on the summary judgment motions, we do not consider this testimony in deciding whether

> the district court erred in granting summary judgment for appellee.

Id.

The correct standard requires that in order to be part of the evidence to be considered by appellate courts in determining whether summary judgment was appropriately granted by the trial court, the relevant evidence must be part of the record before the trial judge at the time of the summary judgment ruling. In the instant case, the evidence that Judge Taylor subsequently ruled created a fact issue as to the liability of parties other than EIT was never produced in any form until after summary judgment was entered in favor of EIT. Clearly, to argue that such evidence requires the reversal of a summary judgment that was granted months earlier, misstates law and defies reason.

Second, in its zeal to find some solace in Judge Taylor's subsequent Order, Petitioner claims:

> The district court found a substantial dealer conspiracy to eliminate price competition and

> therefore denied respective summary judgment motions by the trade association and dealer defendants.

(Petitioner's Br. P. 3) No such "fact-finding" language is found in Judge Taylor's January, 1996 Order. Rather, he simply stated that as to the Scuba Retailers Association:

> [T]his evidence is sufficient only to create a triable issue of material fact on the issue. Neither side has successfully shown the undisputed facts prove either an agreement or lack of an agreement as a matter of law. Therefore, the Court denies both motions for summary judgment.

Thus, by denying summary judgment as to the Scuba Retailers Association, Judge Taylor did not find "a substantial dealer conspiracy to eliminate price competition." (Petitioner's Br. P. 3); only that, as to this defendant, issues of fact remained to be tried.

Petitioner not only misstates the text of Judge Taylor's Order, but also ignores the crucial fact that in the very same decision, he ruled in favor of the only remaining manufacturer defendant, Princeton Tectonics, on the same legal basis as in his earlier legal decision for EIT. Judge

Taylor granted summary judgment as to Princeton Tectonics because, like EIT, it had only responded to its own dealer complaints. Thus, there was insufficient evidence to link Princeton Tectonics to any alleged conspiracy. Per Judge Taylor:

> In all material respects, the allegations in Performance's complaint of Princeton's participation in the allegedly unlawful conspiracy are the same as the allegations directed against EIT and Beuchat. Therefore, the court's reasoning in the September 12, 1995, order applies with equal force to analysis of Princeton's motion for summary judgment.

Therefore, even at the time he denied the Scuba Retailers Association's motion for summary judgment, Judge Taylor remained unpersuaded that any manufacturer had "joined" any retail-level conspiracy against Performance Diver.

Performance Diver's strained interpretation of the proceedings below provides no basis for this Court to exercise its discretionary jurisdiction over this case. The courts below properly found no evidence that EIT had ever conspired against Performance Diver. Judge Taylor's Orders clearly establish that, despite the possibility that the Scuba

Retailers Association itself may somehow have boycotted Performance Diver, Performance Diver simply never produced credible evidence sufficient to create a triable issue of fact to link a manufacturer such as EIT to any such alleged conspiracy. The rulings of the District Court and of the Court of Appeals for the Ninth Circuit were entirely consistent with every other similar case. See National Marine Elec. Distribs., Inc. v. Raytheon Co., 778 F.2d 190 (4th Cir. 1986); Bailey's, Inc. v. Windsor Am., Inc., 948 F.2d 1018 (6th Cir. 1991); See also KMB Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123 (2d Cir. 1995); Garment Dist., Inc. v. Belk Stores Servs., Inc., 799 F.2d 905 (4th Cir. 1986); Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148 (9th Cir. 1988).

CONCLUSION

Petitioner's attempt to create a conflict between the Circuits fares no better in this Court than its attempt to create a triable issue of fact in the courts below. This petition presents no issue remotely requiring exercise of this Court's appellate jurisdiction. The writ should be denied.

Respectfully submitted,

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**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

THE NINTH CIRCUIT'S ALLOWANCE OF PIECEMEAL APPEALS IS IN CONFLICT WITH RECENT ELEVENTH CIRCUIT AND SEVENTH CIRCUIT DECISIONS DISMISSING PIECEMEAL APPEALS FOR LACK OF APPELLATE JURISDICTION

In its response EIT argues that the Ninth Circuit's allowance of a piecemeal appeal by EIT is proper under Rule 54(b) because the reasons for the Rule 54(b) judgment, though not articulated by the District Court, were "obvious from the face of the complaint." Brief In Opposition, page 7. The reasons are not obvious from the face of the complaint. Indeed, EIT was unable (and did not try) to articulate any "obvious" reasons to the District Court, the Ninth Circuit or this Court. Rather, the record in this case presents exactly the procedural context in which piecemeal appeals are inappropriate as recognized by the Eleventh Circuit. The Eleventh Circuit in *Ebrahimi v. City of Huntsville Board of Education*, 114 F.3d 162 (May 9, 1997), was emphatic that where a sound basis for use of Rule 54(b) is not expressed, the Court has little choice but to dismiss the appeal for lack of appellate jurisdiction. 114 F.3d at 166-167. Recently, in *Union Oil of California v. John Brown E&C*, 121 F.3d 305, 311 (7th Cir. 1997), the Seventh Circuit, also in conflict with the Ninth Circuit, rejected a piecemeal appeal. (The Seventh Circuit rejected the notion that the policy against piecemeal appeals may be avoided under 28 U.S.C. §1291 or under Rule 54(b) at the whim of the plaintiff.)

"The district court should make the express determination [that there is no just reason for delay] only in the infrequent case in which a failure to do so might have

a harsh effect." Wright & Miller, Federal Practice and Procedure, CV Section 2659. The District Court in the case at bar made no finding of any adverse effects that might be caused by delay in entry of the judgment. Further, there is no ability to make such a determination simply from the complaint. In short, there are no harsh effects that necessitated use of Rule 54(b).

This Court has emphasized that to avoid piecemeal appeals caution should be exercised to make specific findings before entry of judgment under Rule 54(b). See, *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 100 S.Ct. 1460 (1980). The Ninth Circuit must be directed to honor this rule of law. See, Scalia, *"The Rule of Law As A Law of Rules,"* 56 U. Chi. L. Rev. 1175, 1178 (1989).

In the case at bar, EIT's piecemeal appeal was allowed by the District Court and the Ninth Circuit at a time that EIT had a counterclaim pending and the conspiracy claims raised in the complaint against EIT were still pending against other defendants to whom the District Court denied summary judgment. The District Court made no express finding as required by the plain language of Rule 54(b) and as mandated by the Eleventh Circuit in *Ebrahimi v. City of Huntsville Board of Education*, 114 F.3d 162 (May 9, 1997). At the time the District Court entered respondents' Rule 54(b) judgments, at the very least there should have been "at least one . . . claim or all the rights and liabilities of at least one party" finally adjudicated. Wright & Miller, Federal Practice and Procedure, CV Section 2659, p. 18,205. That was not the situation. At the time of entry of the Rule 54(b) judgment for EIT, the same claims were still pending against other conspirator defendants and EIT still had a counterclaim

pending. Because the Ninth Circuit asserted appellate jurisdiction to adjudicate the piecemeal appeal by EIT outside the context of the remainder of the case, the court apparently succumbed to the same erroneous and unsupported argument that EIT makes to this Court: that the allegations and record before the District Court described only a vertical relationship rather than an ongoing horizontal conspiracy.

II.

THE RECORD BEFORE THE TRIAL COURT AT THE TIME OF ITS JANUARY 10, 1996 ORDER DENYING SUMMARY JUDGMENTS TO SEVERAL CONSPIRATORS WAS THE SAME RECORD THAT WAS BEFORE THE TRIAL COURT WHEN IT GRANTED SUMMARY JUDGMENT TO EIT

EIT makes a frivolous argument that the record that was before the trial court when it granted summary judgment to EIT in September, 1995 did not have the same conspiracy evidence in it as did the record on January 10, 1996 when it denied summary judgment to other conspirators. EIT does not (and cannot) cite or refer to a single fact that was allegedly made part of the record after judgment was entered in favor of EIT.

In the January 10, 1996 Order the District Court found sufficient evidence for a jury to find the existence of a horizontal conspiracy. The District Court cited the record it relied upon for its January 10, 1996 determination, which in large part were the "Scuba Retailer" publications of defendant SRA. The Court cited and quoted those publications at page 10 of its Order. (1/10/96 Order

p. 13). Those "Scuba Retailer" publications were part of the record before the District Court when EIT's motion for summary judgment was pending. Those publications were attached as exhibits to the deposition of Robert Holston which was taken May 9, 1995 and which was attended by counsel for respondent EIT. The deposition of Holston and the exhibits were filed as part of the record before the District Court with Plaintiff's opposition to EIT's motion for summary judgment on August 28, 1995. (See Docket Entries 108-110). That deposition of Mr. Holston and the exhibits thereto were discussed and quoted at length at pages 13-17 of Plaintiff's memorandum in opposition to EIT's motion for summary judgment. (Docket Entries 108-110). Accordingly, the factual basis for the Court's Order of January 10, 1996 was part of the record and before the District Court as part of Plaintiff's opposition to EIT's Motion for summary judgment.

Indeed, EIT's false argument that the complete record was not before the District Court when it granted EIT's summary judgment motion highlights the danger of piecemeal appeals and why they are highly disfavored. Certiorari should be granted to correct the lower court's allowance of piecemeal appeals and the lack of compliance with F. R. Civ. P. Rule 54(b).

III.

THE PROPER CHARACTERIZATION OF A SHERMAN ACT CONSPIRACY INVOLVING DISTRIBUTORS THAT IS JOINED BY SUPPLIERS AS HORIZONTAL AND NOT VERTICAL IS FUNDAMENTAL AND SHOULD BE CLARIFIED AS REFLECTED IN *KHAN v. STATE OIL CO.*

This Court recently heard argument in *Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir.), *cert. granted*, ___ U.S. ___ (1997), which involves application of the *per se* rule to a maximum vertical price fixing case (U.S. Law Week p. 3289 10/21/97). On November 4, 1997 this Court unanimously ruled for the defendant and reversed its earlier decision in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). The *per se* rule will not apply to vertical maximum price fixing. However, the *per se* rule does remain applicable to horizontal maximum price fixing. See, *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466 (1982). Moreover, the *per se* rule plainly applies to non-maximum horizontal price fixing. See, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 111 S.Ct. 401 (1990); *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811 (1940).

This Court's recent decision in *Khan*, highlights the importance of the legal significance between horizontal and vertical restraints. That distinction was disregarded by the Ninth Circuit and the District Court in the case at bar. This case presents an excellent vehicle to further clarify, in the wake of *Khan*, the distinction between the rules applicable to horizontal restraints and the rules applicable to vertical restraints under Section One of the Sherman Act, 15 U.S.C. §1.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, Petitioner respectfully urges that the Petition be granted.

Respectfully submitted,

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